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OF THE

CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES

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OF THE

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PREFACE

Crime which exploits offshore haven banks, trusts and companies is extensive, and is expanding.

Criminals, tax evaders and fraudulent offshore operators can rely on the secrecy and non-cooperativeness of specific offshore havens to shield them from detection and prosecution. Increasingly, justice is denied.

Crime offshore poses a threat to the public's safety and confidence in the criminal justice system, stymies the collection of tax revenues, and unstabilizes and erodes confidence in the banking system.

The Permanent Subcommittee on Investigations has identified over 150 recent or current cases which demonstrate that such crimes are sophisticated, complex, continuing business-type activities. Typically, an individual or organization engages in a number of different offenses as part of this activity. Fraud, drug trafficking, local corruption, bank embezzlement, even homicide, indicate a common inter-related offense pattern in which money laundering is but a part. Bankers, lawyers, offshore politicians and gangsters use offshore banking facilities as part of organized criminal enterprises. Individual cases typically involve millions of dollars, some, hundreds of millions, a few, perhaps billions.

The Subcommittee has also identified a number of cases involving what appear to be otherwise ordinary Americans engaged in using offshore facilities to facilitate tax fraud. These cases signify that the illegal use of offshore facilities has enveloped "the man next door"—a trend which forecasts severe consequences for the country.

The use of offshore facilities is, of course, an important aspect of America's so-called underground economy. Reasonably, estimates of the size of that economy range from $100 billion to $330 billion. Offshore criminality, as the "foreign commerce" sector of the underground economy, is reasonably estimated to range from a low $9 billion to a maximum of $40 billion annually. The mid-point estimate for illicit offshore export of funds is $20 billion of the uncertain but far larger underground economy.[1]

The range of criminal activities offshore is vast, touching on the responsibilities of a number of U.S. enforcement agencies: The Department of Justice, Comptroller of the Currency, Securities and Exchange Commission, Drug Enforcement Administration, Commodity Futures Trading Commission, Federal Bureau of Investigation, Customs Service, Postal Service and the Internal Revenue Service. Because offshore crime occurs in the context of local banking and political affairs, it also affects the concern of the U.S. Federal Reserve, the State Department and our military and intelligence agencies.

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[1] See discussion, *infra* at pp. 55–59.

Present Federal agency efforts are uncoordinated and inadequate, blocked by secrecy statutes abroad and lacking adequate trained personnel within the government.

It would appear that a range of steps should be taken in response to this critical problem. These must be planned and coordinated to provide a new, Federal capability to oversee action at three general levels 1) legislative, administrative, and other reforms in the U.S.; 2) international initiatives via agreements, treaties, assistance, and cooperation; 3) and ultimately, possible severe sanctions to offshore havens which refuse cooperation in criminal matters.

The staff of the Permanent Subcommittee on Investigations has made numerous specific recommendations for improvements after two years of strenuous inquiry and analysis at home and abroad. The staff is convinced—and that conviction is widely shared by enforcement officials in the U.S. and abroad—that resolute, coordinated action must be taken.

The following staff study, and the Subcommittee consultant's work, present the issues in context and perspective, describe typical criminal cases, and document our conclusions.

TABLE OF CONTENTS

Page

Preface III

I. Introduction 1
    The Rationale Behind Offshore Accounts 1
II. The Problem: An Overview 3
III. How Havens Are Used and Abused 6
    Offshore Secrecy 6
    Haven Characteristics 7
    The IRS's List of Tax Havens 10
    U.S. Tax Treaties with Haven Countries 12
    Blocking Laws 13
    How Much Money Goes Offshore? 15
    Problems Posed by the Cayman Islands 16
    Secrecy Laws of the Bahamas 19
    Secrecy and International Banking Stability 20
IV. Tax Havens: Definition and Evolution 22
    Expansion of the Euromarket 25
        Euromarket Banking Controls 28
        Criminal Risk Imbedded in Major Eurobanking Issues 30
        The Invisible Eurobank Issue: Crime 31
        United States International Banking Facilities 33
    Economic Crises and Historical Parallels: Related Argument Internal to the United States 37
    The Underground Economy 38
    Control: Regulation versus Supervision 41
    Summary of Reasons for Offshore Financial Activity 44
    Offshores: Do They Profit a Jurisdiction? 45
    The Expanding Offshore Criminal Market: Fraud and Its Friendly Environment 46
    Enter Opportunity: The Offshore Havens 48
V. Country Sketches 49
    Antigua 50
        Antiguan Banks and Registered Companies 50
    Bahamas 54
        The Operation of the System 57
    Bermuda 62
    Montserrat 68
        A Historical Example 71
        Views of the United Kingdom 73
        Local Appraisal 74
    Panama 77
    Switzerland 85
    The Cayman Islands 94
    Other Havens 95
VI. Money Laundering: Prime Components 95
    Banks 95
    Bankers' Discretion and Powers of Attorney: An Area for Bankers' Self Improvement 96
    Improving Banks' Diligence 97
    Is Diligence Associated with Profitability and Insolvency Risk? 98
    Moving Money Offshore: Creation of Trusts 98
    One Bank's Solution: Secrecy Waiver for Offshore Trusts 99
    Banking and an Anti-Crime Ethic 99
    Critical Control Points: A Central Issue Is Bank Supervision 99
    No Haven Has Indigenous Adequate Supervision 100
    International Bank Headquarters Supervision Is not Adequate 100
    Central Bank Supervision Is as Yet Inadequate 102

Preface—Continued

Page

- Several Important Recommendations Toward Excluding Criminality 103
- East Caribbean Currency Authority and the Proposed Central Bank 104
- A Case in Point 105
- Critical Control Points: Summary of Conclusions 106
- The Role of U.S. Agencies 109
  - Department Of Justice 111
  - Department of State 111
  - Internal Revenue Service 111
  - Department of Treasury 112
  - Securities and Exchange Commission 112
  - Federal Reserve 112
  - Comptroller of Currency 112
  - Drug Enforcement Administration 112
- Panacea Proposals Abound 113
- Criminal Cash Movements 114
- The Only Monitor: The Bank Secrecy Act 114
  - From Enactment to Enforcement: A Slow Evolution 118
  - Despite Some Successes, Little is Known 121
- An Analysis of Currency Transaction Reports for 1981:
  - More Questions Raised Than Answered 122
- Law Enforcement Approaches 124
  - Operation Greenback 124
  - Operation Bancoshares 124
  - Breakthroughs in the Caribbean 125
  - Another Breakthrough: The U.S.-Swiss Accord 126

VII. Past Congressional Efforts: A Summary 126
- Fresh Initiatives: The Caribbean Basin Initiative 130

VIII. Summary and Suggestions 133
- Necessary Perspectives 135
- Coercive Sanctions 136
- Is the U.S. Itself Culpable? 137

IX. Recommendations 139
- Legislative 139
- Internal Revenue Service 140
- Department of State 140
- Department of Justice 141
- Department of the Treasury 141
- Drug Enforcement Administration 141
- U.S. Customs Service 141
- General 141

APPENDIX

I. Banking, Commercial Secrecy, and Blocking Laws:

- United Kingdom—Law of Evidence 177
- English-speaking Caribbean and Atlantic Region Countries—Library of Congress Analysis 181
- Antigua—International Business Companies Ordinance 186
- Austria—Library of Congress Analysis of Blocking and Secrecy Law 189
- Bermuda—Secrecy Law 203
- Cayman Islands—Confidential Relationships Law 204
- Costa Rica—Bank Secrecy Law 207
- Dominican Republic—Bank Secrecy Law 208
- El Salvador—Bank Secrecy Law 209
- France—Library of Congress Analysis of Blocking Law 210
- Federal Republic of Germany—Library of Congress Analysis of Blocking Law 211
- Hong Kong—Excerpts from Banking Ordinance Regarding Secrecy. 213
- Liechtenstein—Excerpt from Banking Law Regarding Secrecy 216
- Luxemburg—Excerpt from Banking Law Regarding Secrecy 217
- Montserrat—Confidential Information Ordinance 218
- Netherlands Antilles—Library of Congress Analysis of Secrecy Law 222
- Norway—Library of Congress Analysis of Disclosure Practices 223
- Panama—Banking Law Together with Library of Congress Analysis 224

I. Banking, Commercial Secrecy, and Blocking Laws—Continued

Law Enforcement Approaches—Continued

Page
Switzerland—Secrecy Law and Swiss Bank Diligence Agreement 229
South Africa—Protection of Businesses Act 242
United Kingdom—Protection of Trading Interests Act (Blocking Law) with Library of Congress Analysis 244
II. Catalog of U.S. Cases Involving Bank or Commercial Secrecy 145

OFFSHORE BANKING

I. INTRODUCTION

In the spring of 1981, the Senate Permanent Subcommittee on Investigations (PSI) began an investigation of the uses of offshore banks, corporations and other entities and instruments to facilitate criminal activities in the United States. The pursuit has led from Wall Street board rooms to dusty attorneys' offices overlooking the dirt roads of Antigua. The paper trails of money flow unfold from such unlikely places as tiny farm communities in Nebraska to an obscure bank in the Turks and Caicos Islands in the Caribbean. The staff's investigation, which was anticipated to lead to organized crime figures and drug traffickers, did that, but it has led much further. Based on the inquiry conducted to date, the staff concludes that the use of so-called "secret" offshore facilities has become so pervasive that it challenges basic assumptions regarding the ability of federal and state authorities to enforce the laws.

In some circles, the use of offshore banks, trusts and companies has become a cottage industry. Tax protesters sell offshore trust packages for up to $35,000 to heavily armed farmers in the Midwest who are determined to hide their income from the IRS. Bank brokers are selling untold numbers of banks and companies to U.S. citizens in countries whose names most people would not recognize. Expensive offshore banking and tax avoidance conferences draw thousands of interested people, some of whom seem determined to pay $30,000 to be the first on their block to own a Caribbean bank. Indeed, the otherwise ordinary citizen may be routinely corresponding with his bank or company elsewhere offshore.

The rationale behind offshore accounts

Based on the kind of scenarios noted above, the Subcommittee undertook this investigation in an effort to determine the extent to which offshore facilities are being used to commit all types of criminal violations in the United States.

A Los Angeles attorney and major money launderer provided perhaps the best explanation in the criminal use of offshore facilities when he told a DEA agent in 1980: "There is no exposure at all. You don't have to see anybody. You don't have to say your name. They don't know you. You don't know them. End of story."

For over 10 years that had been the end of the story for Nate Markowitz and his clients. He had laundered millions for his narcotics trafficking clients through an intricate web of companies and trusts in Bermuda, Liberia and the Netherlands Antilles.

Markowitz made his comment to a new client who was introduced as a major drug dealer. His client had told him what a terrible situation it was to have made a few dollars and not to be able to spend it. Markowitz said his money laundry was the foolproof situation.

> . . . You're going to take it out of your right hand pocket and pay it back into your left hand pocket . . . which I think is a beautiful way to use your money . . . You haven't transported money out of the United States which is a crime, you haven't taken the risk of carrying it, and it's done on a bank to bank basis. Within 48 to 72 hours, I can move the money from Los Angeles to Bangkok or Istanbul or Afghanistan or wherever you want it . . . And you see, if Uncle then looks at you and says where did you get this money from, well (you say) I borrowed the money from such and such corporation which is an offshore corporation and they're in the money lending business . . . you see, for 20 to 22 thousand bucks, you got yourself a totally confidential set up.

From July through October of 1980, Markowitz worked with his new client and several of the client's associates in explaining and setting up a laundry for their needs. In September 1980, Markowitz was named as an unindicted co-conspirator in one of the largest money laundering cases ever brought by the U.S. Government. Markowitz's clients were agents of the Internal Revenue Service and Drug Enforcement Agency. For four months they had painstakingly recorded numerous conversations with Markowitz and his conspirators including the senior officers of the Garfield Bank in California. Markowitz had, however, seemingly escaped the net, facing at the most some civil penalties.

But at noon on April 3, 1981, Markowitz was found slumped in a parking lot stairwell with several .22 caliber bullets in his body and over $50,000 in cash in his pocket. He had been shot at point blank range.[1]

The Markowitz case is a typical narcotics money laundering story, unusual only because of its size. His operation was broken by a series of very sophisticated law enforcement techniques reserved for those special cases where little else works. Those who deal offshore for illegal purposes choose the offshore facilities because of the tight wall of secrecy that surrounds their transactions—secrecy which in most cases has been purposefully legislated by the so-called "haven countries" being used.

This secrecy makes Markowitz-type laundries extremely difficult to penetrate and calls for extraordinary investigative and prosecutorial efforts. But can law enforcement afford to invest such energies routinely? What about a small Iowa farmer who launders $300,000 a year in receipts through an obscure Pacific bank? Unfortunately, the answer to the question is, no. The government's resources are not sufficient to even detect such schemes.

No one really knows how much money is moved offshore each year, though it has long been acknowledged that organized crime, narcotics traffickers and other "big money" operations, including big business itself, make regular use of havens. This study provides evidence of a more disturbing nature—indications that the use of offshore facilities for illegal purposes has become so widespread that it can literally involve the man next door throughout America. This report and PSI hearings will address such critical issues as: (1) the ease with which huge amounts of illegally derived wealth are secretly transported out of and into this country and elsewhere around the world; (2) the concealment afforded by bank and commercial secrecy and blocking laws of many offshore jurisdictions; (3) the difficulties encountered by U.S. law enforcement authorities in attempting to interdict criminal money outflows and inflows or to penetrate the offshore secrecy veil; (4) the brokering of offshore banks and companies to U.S. citizens and the use of such entities for unlawful purposes; and (5) the collision of U.S. governmental interests, policies, and practices with those of the "secrecy" countries—a collision from which the criminal more often than not escapes unscathed, with his profits secure.

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[1] See discussion, *infra* at pp. 55–59.

The Subcommittee's investigation was far reaching. Interviews were conducted in the United States and abroad with scores of government officials, bankers, lawyers, businessmen, bank brokers, their clients, holders of offshore bank accounts, convicted drug smugglers and con artists who have used offshore banks and other entities as money conduits for their illegal enterprises.

Staff visits were made in 1981 to the Cayman Islands and in 1982 to Antigua, Bermuda, the Bahamas, Montserrat, and Panama. Richard H. Blum, Ph. D., a criminologist with excellent credentials in the offshore field, was retained to assist the staff, to prepare a written report on the offshore problem, and to recommend remedies. In his capacity as a Subcommittee consultant, Dr. Blum met with public and private sector people in Switzerland and England. In addition, the PSI staff compiled an extensive catalog of criminal and civil cases involving the use of offshore entities and instruments. The Subcommittee also compiled copies of current and past laws and court decisions governing banking and commercial secrecy in several English- and Spanish-speaking countries and several countries in Europe and the Far East. Many of these are reproduced in the Appendix to this study.

II. THE PROBLEM: AN OVERVIEW

For the United States, its institutions, and its people, the use of the international banking and business system for criminal purposes is an increasing problem. It undermines the integrity of American banks and other institutions of commerce. It threatens the integrity of our tax system and deprives the Treasury of badly needed revenue. It feeds the coffers of criminal enterprises. It corrupts public and private morals. And, despite some major prosecutorial successes in recent years, the problem is a source of great frustration for U.S. law enforcement authorities and for Congress.

The problem is far from new. In 1970, when the Congress passed the Bank Secrecy Act in an effort to slow the outward flow of criminal cash from the United States, the House report on that legislation observed:

> Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of "white collar" crime; have served as the financial underpinning of orga-

> nized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in fraud including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracies to steal from U.S. defense and foreign aid funds; and have served as the cleansing agent for "hot" or illegally obtained monies.
>
> The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. Unwarranted and unwanted credit is being pumped into our markets. There have been some cases of corporation directors, officers and employees who, through deceit and violation of law, enriched themselves or endangered the financial soundness of their companies to the detriment of their stockholders. Criminals engaged in illegal gambling, skimming and narcotics traffic are operating their financial affairs with an impunity that approaches statutory exemption.[2]

Today the use and abuse of offshore facilities is much more pervasive, more sophisticated, far more difficult for investigators and prosecutors to unravel than ever before. A few recent examples include:

In late 1982, reports of a massive investigation by federal and state authorities surfaced in Texas, New York, Kentucky, Florida and Georgia regarding another huge money laundering operation. The inquiry, which apparently began two years before with an investigation of a Houston oil company, was now centered on the clandestine movement through offshore banks and corporations—mainly in the Caymans and Bahamas—of "billions of dollars" in profits from narcotics trafficking, crude oil resale, coal tax shelters, and other illicit enterprises.

In Los Angeles, a woman was awaiting trial on charges of masterminding the nation's largest child pornography operation; her customers allegedly have been funneling payments to her since the early 1970's into numbered bank accounts in the Caymans and Switzerland, enabling her to acquire extensive property holdings, drive a Rolls-Royce, a Cadillac and a Lincoln, and gross more than $525,000 a year, although at the time she was receiving welfare payments.

Tax protesters and others bent on evading U.S. income tax laws are using and buying banks in such obscure Caribbean islands as Antigua, the Turks and Caicos, and Montserrat. Bank "brokers" are looking to such out-of-the-way locations as the U.S. Trust Territory of the Northern Mariana Islands in the Western Pacific and Nauru as potential sites for more "paper" banks.

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[2] House Report 91-975 on Banks Records and Foreign Transactions concerning P.L. 95-508 enacted October 12, 1970.

In New York, where the gross revenue from illegal drug trafficking is said to top $45 billion a year, the daily cash turnover is so vast that the traffickers have difficulty in disposing of the take.

In November 1982, a Citibank account executive was arrested in New York with eight other persons in a money-laundering scheme that handled more than $100 million, most of it cocaine profits. The same month, a Colombian coffee importer with offices on Wall Street was indicted for conspiracy and other charges after an organization he headed made 193 cash deposits totaling $96.4 million in a single bank account. Another group of Colombians, flush with cocaine dollars, were arrested after officials at a leading New York brokerage house became suspicious when the men moved $38 million through their brokerage account in two months.

Simply changing money for drug dealers has become big business, especially in such gateways as Miami and New York. Professional money counters are hired just to physically calculate the take. Others transform old money—the fives, tens and twenties that come off the street—into crisp hundred dollar bills for a one per cent fee. So much currency is involved in some cases that, rather than using automatic counters, some money changers simply count cash by weighing it—so many pounds of fives, ten and twenties equal so many thousands of dollars.

Some prefer to carry cash hordes directly to offshore banks. Air charter services in various parts of the country flourish by ferrying suitcases and even cardboard boxes directly to banks in the Bahamas, Caymans or Panama. Those carrying lesser amounts routinely use commercial airlines. For example, Miami and Houston offer direct flights to the Cayman Islands. Briefcase carrying businessmen routinely board in the morning, store cash in banks eager to accept deposits and return in the evening. One convicted commodity fraud operator testified at PSI hearings in 1982 that a major reason for selecting Clearwater, Florida, as his base was that it had one of the few direct flights to the Caymans at that time.

Even major international banks are not immune from the infection of questionable, hidden transactions. In 1980, the Nugan Hand Bank Based in Sydney, Australia, with 22 offices around the world (including four in the U.S.), went into liquidation with $50 million unaccounted for—$20 million of it missing from its branch in the Caymans, where the bank was originally registered. Evidence has surfaced indicating that the Nugan Hand Bank was deeply involved in moving funds around the world for big international heroin dealers and may have been involved in international arms trafficking. Moreover, suspicions have been raised that Nugan Hand may have been used to channel funds to favored Australian political candidates. About 10 weeks before the Nugan Hand Bank failed, Frank Nugan, director of the bank, was found shot to death—an apparent suicide—in his Mercedes-Benz in a woods near Sydney.

In 1982, Banco Ambrosiano of Milan, Italy, collapsed, crippled by a $1.4 billion exposure in loans to several mysterious Panamanian "shell" companies which had been endorsed by the Vatican Bank, Istituto per le Opere di Religione. Banco Ambrosiano, the largest private banking group in Italy, had operations in 15 countries. Frank Sindona, now serving a 25-year prison term in upstate New York for bank fraud in connection with the 1974 collapse of Long Island's Franklin National Bank, reportedly was for years a financial advisor to the Vatican; he claims he was framed in the Franklin affair by powerful Italian state banking interests who would not produce documents that would clear him, and Sindona, who still faces charges related to the collapse of Italian banks he owned, says he was involved with the Banco Ambrosiano president, Robert Calvi, and other members of the secret Italian Masonic lodge known as Propoaganda Due, or P2, in sending Ambrosiano money to Latin America to support right-wing political causes. Seven weeks before Banco Ambrosiano went under, Calvi was found hanging from a rope on a workmen's scaffold beneath London's Blackfriars Bridge.

The opportunity for money laundering and the creation of offshore banks, trusts and companies for the purposes of fraud, exist in part because offshore havens are part of the less regulated Euromarket. The Euromarket is a critically important and legitimate feature of international commerce. But in the haven countries where money is laundered and operations hidden, it is unregulated. Thus, the same conditions which facilitate international commerce also create criminal opportunities.

The criminal use of offshore facilities poses a problem to the offshore havens themselves and, in consequence, to the stability of entire national banking systems. The fragile condition of the world's banking system today is a result in part of questionable loans, poor controls and the country risk occurring when so many nations cannot pay the interest or principal on their debt.

This same fragile banking system is threatened by the additional losses in money and confidence which arise when criminal elements plunder the assets of local offshore banks. These banks could collapse, thus incurring losses on the part of their depositors and investors, including other banks which have extended credit through the insolvent bank. It is doubtful whether central banks in many of the haven countries could come to the rescue of such banks in trouble.

It is not inconceivable that it could be a criminally derived loss, not the failure of repayment of a loan from a sovereign nation, which could be the back-breaking straw to the banking system. Because of this possibility, the Subcommittee has examined the need for changes in the entire apparatus of central bank regulation with an eye to improving controls which would affect not only crime offshore but the safety of the world's financial system.

III. HOW HAVENS ARE USED AND ABUSED

Offshore secrecy

While the ownership of money can be established as long as it remains in the United States, once it arrives in offshore jurisdictions it can be—and almost always is—cloaked with perpetual anonymity. This accommodation is afforded by laws authorizing numbered bank accounts and nominee corporations whose beneficial owners are shielded from scrutiny, and by laws subjecting bank employees, lawyers and other professionals to criminal or civil liability for revealing any information about true ownership.

For years, Switzerland has been a major sanctuary for funds whose owners wish to remain anonymous. Swiss bank secrecy, reinforced by strong criminal penalties, dates back to the Hitler-ascendancy days of 1934 when the Swiss enacted a law to prevent the Nazis from forcing Swiss banks to disclose deposits by Jewish customers from Germany who had opened accounts there. Since then, Switzerland and other European countries such as Luxembourg and Liechtenstein have been host to thousands of secret bank accounts and corporations and trusts of unrevealed ownership. In recent years, similar accommodations have become available across the board in Caribbean and South Atlantic countries as the Bahamas and the Cayman Islands.

In addition to providing secrecy, these countries impose no taxation or low taxes on foreign funds. Thus, they do not recognize tax evasion as a crime and are loathe to assist in any investigation of a U.S. citizen suspected of evasion. Indeed, their generous complement of attorneys, accountants and bankers will overnight construct a framework of corporate paper designed to hide true ownership or, if it becomes necessary, to satisfy any inquiries from our Internal Revenue Service.

Except with Switzerland, the United States has no treaty arrangements with any secrecy jurisdiction for the extradition of offshore banking or corporate information. The taxation treaties which the U.S. does have with many secrecy countries provide only for information exchanges aimed at eliminating double taxation of the respective citizens of the treaty partners.

U.S. law enforcement authorities have occasionally resorted to other recognized means to obtain information such as letters rogatory, a time-consuming process involving diplomatic and judicial channels. As noted above, the U.S. has risked generating international friction by obtaining subpoenas against U.S. branch offices of foreign banks for the production of records in other offshore branches or of the headquarters banks themselves. The underlying philosophy is that a foreign bank operating in the U.S. must play by our rules.

What are viewed in some offshore countries as U.S. encroachments on their sovereignty or the good order of their commercial systems have been met with certain backlash actions. In 1976 the Cayman Islands, which had strict bank secrecy before, tightened its laws by adding more substantial sanctions against persons who divulged banking and commercial information. This tightening was a reaction to *United States* v. *Field* 532 F.2d 404 (5th Cir. 1976), in which a U.S. court directed a Cayman resident to give grand jury testimony even though the testimony would violate Cayman bank secrecy laws and subject him to limited criminal penalties.

Haven characteristics

There are almost as many definitions of "tax havens" as there are havens. But most authorities agree that virtually every tax haven is a "secrecy haven" as well, though not every secrecy haven is a tax haven. An exception is the United States: to the extent that it does not tax interest on bank deposits of foreigners, it is a tax haven, but it has no impenetrable wall of secrecy such as exists in most secrecy havens.

A definition of a tax haven attributed to Harvey P. Dale, a professor of law at New York University and a practicing attorney specializing in international and financial transactions, is this: "Any piece of ground which is above sea level at low tide and which has no need for internal revenue." [3] While the second part of that definition would exclude the United States, the first part applies to most of the favored tax havens.

But more precisely, a tax haven is considered to have two main characteristics: it imposes a low or zero rate of tax on all or certain categories of income, and it offers a certain level of banking or commercial secrecy, or both.

The Bahamas, Bermuda, the Cayman Islands, the Turks and Caicos Islands, Nauru and New Hebrides (now Vanatu) are commonly regarded as no-tax jurisdictions even though some taxes, such as employment taxes, may be imposed. Other countries, such as Panama and Costa Rica, have no income tax on foreign-source income. The British Virgin Islands and the Netherlands Antilles are low-tax jurisdictions in the Caribbean which have enjoyed special tax treaty advantages with the United States. These advantages can be elected in the Netherlands Antilles only by subjecting dividends to a local tax of 15 percent and net interest and royalties to a 30 percent rate of tax.

European tax havens, such as the Channel Islands and the Isle of Man, have provided many United Kingdom citizens insulation from England's high tax rates and, in some cases, have been used by some Americans to shelter investments. There are many other jurisdictions throughout the world which have regional advantages as tax havens.

Although a tax haven's laws, by definition, provide for either no or low rates of tax, this observation is not true of all jurisdictions regarded by the United States as tax havens. For instance, Switzerland now has high rates of local taxes and negative interest rates to discourage foreign deposits; but due to its bank secrecy provisions, it is still regarded as a tax haven.

The second generally common characteristic of tax havens is that they protect the confidentiality of financial and commercial information. Many tax havens have laws protecting not only the secrecy of bank accounts but also of corporate ownership; disclosure of such information to any third party is often a violation of the country's civil or criminal law. With this combination of secrecy provisions, it is very difficult to ascertain not only who is depositing money in banks in haven countries, and how much and how frequently, but also who owns the banks. A tax haven, then, is a country which affords secrecy to investors and permits the accumulation of wealth without any significant tax burden.

Secrecy laws were enacted with the tax haven trade in mind and make some information virtually impossible for government investigators to obtain. For example, the Bahamas have a bank secrecy provision found in Section 10 of the Banks and Trust Company Regulations Act of 1965. In the past, the Bahamas have citied this provision in denying U.S. requests for information made through the State Department. The Cayman Islands enacted identical legislation in the Banks and Trust Companies Regulation Law of 1966. *United States* v. *Field,* 532 F.2d 404 (5th Cir., 1976), arose out of Project Haven and established that foreign person subpoenaed in the United States to give testimony before federal grand juries must testify even though giving the testimony would violate the law in their own jurisdictions. In response, the Cayman Islands enacted the Confidential Relationships (Preservation) Law on September 8, 1976. This law, designed to cure perceived shortcomings in the bank secrecy law, imposes criminal sanctions not only upon those who divulge or attempt to divulge confidential information but also upon those who willfully obtain or attempt to obtain such information. The law is also extraterritorial in application.

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[3] Testimony by M. Carr Ferguson, Assistant Attorney General (Tax Division), Department of Justice, at hearings on offshore tax havens before House Ways and Means Oversight Subcommittee, April 24, 1979, p. 2.

The third generally common characteristic of tax havens is that banks and similar financial institutions assume a dominant role in the havens' trade and commerce, and their residents include those skilled in financial transactions, such as bankers, lawyers and accountants. Banks and trust companies in the haven countries undoubtedly can provide a necessary business service in facilitating complex multinational transactions. Indeed, many such countries aggressively compete with each other for American investments. Since American banks at least operate under theoretical standards of decorum and responsibility are not observed worldwide, the role of some of these countries in encouraging and implementing secret arrangement is troublesome.

A vivid example of the rapid growth of tax haven banks and trust companies is offered by the Caymans, a British Crown Colony approximately 170 miles south of Miami. In 1964, the Caymans had only one or two banks and virtually no offshore (non-resident) business. When Subcommittee staff members visited the Caymans in late 1981, the island had about 30 multinational full service "Type A" commercial banks and more than 300 "Type B" brass plate banks, which are allowed to conduct only offshore business. Moreover, about 13,600 companies were registered there. Yet, the population of the Cayman Islands is only about 15,000.

In a report to the Subcommittee at International Narcotics Trafficking hearings in November 1981, the staff members who had visited the Caymans said the islands "provide an outstanding opportunity for individuals seeking to launder or otherwise hide illegal profits. They are readily accessible by commercial and private airlines from the U.S., provide all modern amenities, feature English as the national language, assure a politically stable governmental environment, and maintain strict bank secrecy requirements."

The staff members said that many of the thousands of licensed corporations are used as fronts for a variety of illegal operations. They are also used as fronts for the licensing of private banks. And the government maintains no oversight over these corporations.

Caymanian officials, however, contend that the practice of licensing banks and registering companies is extremely beneficial for their country. Initial and annual licensing fees account for approximately 20 percent of the colony's budget. Cayman is also beginning to licence insurance companies.

The Caymanian Police Commissioner has said he believed illegal money was coming into Cayman, most of it drug money. He said major traffickers may avoid Cayman but mid-level traffickers probably bank there.

The Subcommittee staff members found no disposition on the part of Cayman government or business officials to relax Cayman's tough secrecy laws or to participate in a bank authority for the Caribbean, an idea which has been current for the past several years.

The Bahamas have had a similar history of growth. There are almost 200 U.S. bank branches in the islands. These comprise more than half the 330 banks and trust companies licensed to do business there. A $2 billion to $5 billion trust business is administered in Nassau. Ninety-five percent of this business represents accounts of individuals living abroad. In addition there are 25,000 registered trading companies in the Bahamas of which about 15,000 are active.

Relative sizes of various banking systems [1]

	Billion
Bahrain	$1.4
Panama	27.1
Switzerland	279.5
United States	1,623
Bahamas	([2])
Cayman Islands	([2])
Hong Kong	([2])

[1] Represents reserves, foreign assets, claims on government, claims on state and local governments, claims on private sector as of the end of 1981. One report furnished to PSI staff put Bahamas bank assets at $100 billion. *World Financial Markets*, published by Morgan Guaranty Trust of New York, at the end of June 1981 put deposits in U.S. branches in the Cayman Islands at $35 billion and estimated Hong Kong's offshore deposits to be $36 billion.

[2] Not available.

Source: International Financial Statistics, International Monetary Fund February, 1983.

The IRS's list of tax havens

There is an understandable lack of agreement as to which jurisdictions are "tax havens". In a 1981 letter to Chairman Roth, IRS Commissioner Roscoe Egger identified 29 countries as "tax havens". They include:

Caribbean and South Atlantic area: Antigua, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Grenada, Netherlands Antilles, Panama, St. Kitts, St. Vincent, and Turks and Caicos Islands.

European, Middle Eastern and African area: Austria, Bahrain, Channel Islands, Gibralter, Isle of Man, Liberia, Liechtenstein, Luxembourg, Monaco, the Netherlands, and Switzerland.

Far Eastern and Pacific area: Hong Kong, Nauru, New Hebrides (Vanatu), and Singapore.[4]

At least nine British common law countries regarded as both tax havens and secrecy havens lie within the arc extending from Bermuda southward and eastward to the Cayman Islands. In addition to Bermuda and the Caymans, these include Anguilla, Antigua, the Bahamas, Barbados, Montserrat, St. Vincent, and the Turks and

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[4] Letter to Chairman Roth from IRS Commissioner Roscoe L. Egger, November 2, 1981.

Caicos. They impose little or no income, capital gains or other taxes, and their laws are designed to encourage offshore investments and deposits. Other jurisdictions in the area, such as Jamaica, Trinidad and Tobago, aggressively seek foreign investment. But these do not compete for offshore banks, insurance companies and trust funds by offering tax incentives or other vehicles by which foreigners avoid taxation in their native countries.

In the meantime, other "havens" are mentioned or omitted from the IRS' Gordon Report in 1981. In fact, that report at page 40 lists the following: Bahamas, Bemuda, British Virgin Islands, Montserrat, Anguilla, Caymans, Nevis, St. Kitts, Antigua, Dominica, St. Lucia, Bahrain, Hong Kong, Liberia, Liechtenstein, Luxembourg and Switzerland.[5]

On page 177 of that same report 10 of the above sanctuaries are listed, supplemented by tax haven treaty countries as follows: Barbados, Grenada, Netherlands, Belize, Falkland Islands and Seychelles.

This report defines a tax haven as an area with little or no income tax and high levels of bank/commercial secrecy. A heavy concentration of banking, modern communication facilities, and self promotion as an offshore financial center are contributing features. Gordon uses foreign bank assets held in the havens as a functional measure of their relative importance.

U.S. government departments maintain their own individual lists of havens. Treasury, the Federal Reserve, the FDIC, and the U.S. Comptroller apparently all have lists. So does the Basle-based Bank for International Settlements (BIS).

A survey in "The Banker" (1977) describing offshore financial centers list only nine jurisdictions from among those listed above; but the WFI Corporation, a Southern California organization which publicly offers banking licenses in several locations in a list distributed at its spring 1982 seminar, shows many of the usual locales but adds to the catalogue Canada, Guam, Ireland, Mexico, Cook Islands, and the Maldives. An April 28, 1982, WFI announcement describes the Mariana Islands as a new tax haven, one created at the urging of WFI as the Mariana Islands achieved self-governing U.S. commonwealth status. The announcement indicates that WFI provides purchaser access to this and a number of other offshore banking facilities including, for the Marianas, a "turnkey" capacity. WFI indicates it has been the sole founder of all offshore banks in the Marianas. WFI, comparing a group of havens on infrastructure, political stability, taxation, costs of bank establishment and secrecy laws, concludes that the Marianas are the best haven for the bank purchasers, with Vanuatu second. WFI previously touted Montserrat as the best haven. However, in interviews with the PSI staff, the Montserrat government indicated it now insists on dealing directly with prospective bankers and no longer allows WFI to broker Montserratian banks. WFI has since shifted its emphasis to the Northern Marianas. The point is, everyone has his favorite haven jurisdiction.

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[5] "Tax Havens and Their Use by United States Taxpayers—An Overview," by Richard A. Gordon, January 12, 1981.

The 1981 revision of Federal Reserve regulations which has created the International Banking Facilities (IBFs) clearly establishes the U.S. as an offshore center. It is useful to some as a tax haven, albeit one with some restrictions and without secrecy protection.

From the lists described above and others, several principles become evident:

(a) The definition of a haven depends on the criteria used which in turn tends to relate to considerations such as user advantage and disadvantage.

(b) Haven status changes rapidly depending upon political events as well as shifts in local law or treaties in force. Expert lists will disagree depending upon when they are completed and what judgmental criteria are employed.

(c) Once a particular interest is enunciated, as in the case here, a concern with offshore aided violations of U.S. criminal law, it is necessary to generate a separate "catalogue" of havens on the kinds of criminal uses made of a jurisdiction. Specific characteristics which serve as incentives to those criminal uses and the specific problems posed to U.S. law enforcement authorities as they seek to detect and prosecute the underlying crimes need to be separately considered.

Given the diversity among havens, it would be extremely helpful to know their relative importance in terms of criminal use, the amount of dirty money estimated to be laundered through administered in a jurisdiction, the mechanisms used by offenders to exploit the advantages of a jurisdiction, the nature of the procedures available to U.S. enforcement authorities in dealing with a jurisdiction, and the options or resources potentially available to the United States, including estimates of direct and indirect costs which affect policy planning.

However, because of the key elements which creates a haven of interest to U.S. criminal law violators is the assurance of secrecy, it is not possible to quantify such criminal uses. Any such ranking can only be by estimation based on confidences offered by local bankers or officials, or by examining cases known to U.S. law authorities or arising from police intelligence operations or finally, by extrapolating from the minimal data actually available such as Treasury Department currency transaction reports and repatriation figures. As we will see, none of these options are very reliable.

U.S. tax treaties with haven countries

Of the 29 countries with which the United States had tax treaties at the end of 1981, there were seven in force with tax havens in the Caribbean—most by extension of the U.S. tax treaty with the United Kingdom. Those covered by this extension include Antigua, Barbados, Belize, British Virgin Islands, Grenada and St. Vincent.

In addition, there is a U.S. tax treaty with the Netherlands Antilles. It is under renegotiation as the U.S. attempts to remove its "treaty shopping" provisions since they are considered to be unfavorable to the U.S. tax position. The U.S. treaty with the British Virgin Islands expired at the end of 1982 because that British territory refused to drop "treaty shopping" provisions unacceptable to this country. Besides those Caribbean countries which appear on the IRS tax haven list, other countries in that area with which the United States has tax treaties—and which appear on other lists of tax havens—include Anguilla, Montserrat and the Turks and Caicos Islands.

In Europe, the United States has tax treaties with four IRS-designated tax havens—Austria, Luxembourg, the Netherlands and Switzerland. Since 1977, the United States has also had in force with Switzerland a mutual assistance treaty on criminal matters whereby each country exchanges financial and other information in court-admissible form on a wide range of crimes—but not tax evasion unless committed by a person who is a member of organized crime. In 1982, the Swiss gave our Securities and Exchange Commission access to bank and commercial information in investigations of insider trading.

It is noteworthy that the United States has no tax or mutual assistance treaties with countries within the Caribbean-South Atlantic arc which have been the most troublesome because of their secrecy laws and practices—the Bahamas, Bermuda, the Cayman Islands and Panama. Moreover, the tax treaties which this country has with some of the IRS-designated tax havens provide only for information exchanges aimed primarily at eliminating double taxation for the respective citizens of treaty countries. U.S. efforts to negotiate mutual assistance treaties with several tax havens have so far proved to be fruitless.

Blocking laws [6]

A major obstacle to U.S. efforts to obtain information abroad about illegal commercial activity is found in so-called "blocking laws" enacted by about 26 major foreign jurisdictions. In the view of the SEC, these laws impede judicial or administrative proceedings by restricting or prohibiting testimony or the production of documents for use in such proceedings.

These "blocking" statutes prohibit the disclosure, copying, inspection or removal of documents located in the host country in compliance with orders of foreign authorities. Some laws cover all documents, others only certain categories. All blocking laws carry some form of penal sanction for noncompliance by either the party requesting or the party producing the protected documents. Restrictions on the production of information are often not absolute.

According to the SEC, the legislative history of many of the foreign blocking laws states that these statutes were enacted in response to problems allegedly encountered by local industry and commerce as a result of United States litigation, notably in the antitrust field. Many nations, in enacting their blocking statutes, felt that the estraterritorial application of U.S. antitrust and similar laws were being used as a means of protectionsim against foreign competition.

Another factor precipitating foreign response appears to have been based on the extensive use of U.S. pretrial discovery procedures. The foreign governments feel that these imposed burdensome requests on foreign companies or individuals to disclose large amounts of information which companies feared would enable their U.S. competitors to take the economic advantage of such information.

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[6] This discussion is excerpted from a speech by John M. Fedders, Director, Division of Enforcement, Securities and Exchange Commission, at the 10th annual Securities Regulation Institute at the University of California at San Diego, January 1983.

In the 97th Congress, an effort was made to retailiate against foreign blocking laws. Legislation known as the "Protection of Confidential Business Information Act" was introduced in both Houses. Under the bill (S. 1592 in the Senate, H.R. 4339 in the House), the Securities and Exchange Commission could issue protective orders to block disclosure of confidential business information mandated by foreign law.

Among foreign countries which have enacted blocking laws are Australia, Canada, West Germany, Norway, South Africa, and the United Kingdom. But perhaps the most prohibitive of the blocking statutes is the one enacted by France in 1980, forbidding communication of and requests for certain documents and information.

An unofficial translated version of the statute reads as follows:

> Law relating to the communication of economic, commercial, industrial, financial or technical documents or information to foreign physical or legal persons.
>
> Article 1. Subject to International treaties or agreements, it is forbidden for any physical person of French nationality or habitually residing on French territory and for any officer, agent or employee of any legal entity having therein its principal office or establishment to communicate in writing, orally or in any other form, at any place, to foreign public authorities, documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which would threaten the sovereignty, security, or essential economic interests of France or the public order, as specified when necessary by government authorities.
>
> Article 1 *bis*. Subject to international treaties or agreements, and laws and regulations in force, it is forbidden for any person to request, seek or communicate, in writing, orally or in any form, documents or information of an economic, commercial, industrial, financial or technical nature, leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures.
>
> Article 2. The persons referred to in article 1 and 1 *bis* of the present law should be punished by imprisonment of from two to six months and/or a fine of from 10,000 to 12,000 francs.

The legislative history of the French statute gives no criteria as to what sort of documents or information is deemed to endanger the "sovereignty, security or essential economic interests of France or the public order." Moreover, under article 1 *bis*, criminal penalties can be imposed not only for communication of proscribed documents but for attempts to obtain them in violation of the statute.

The United Kingdom's "Protection of Trading Interests Act" adopted in 1980 has a similar "endanger the sovereignty" clause. It applies where measures being pursued by a foreign country may "threaten to damage the trading interests of the United Kingdom."

The American Bar Association says the United Kingdom statute "shields U.K. nationals from U.S. court orders for the production of evidence, bars the enforcement of decisions which in its view infringe the jurisdiction or intrude upon the sovereignty of the U.K. and enables U.K. companies to draw back treble damage anti-trust penalties assessed by a U.S. court out of hostage local assets."[7]

Overall, in a preliminary report on the extraterritorial application of U.S. laws, the Bar concludes that "U.S. law is running into more and more opposition as it applies abroad. . . . Laws blocking the enforcement of discovery orders of U.S. courts have long been in force in many countries. . . . In sum, U.S. law, as it applies beyond U.S. borders, is increasingly under fire."

How much money goes offshore?

No one knows. A 1979 work by Professors Richard Blum and John Kaplan made an estimate on the basis of opinions gathered from bankers and police in various offshore jurisdictions. That first credulous guess was $50 billion annually. Given reasonable estimates of the size of the underground economy, and the lack of access to it or skill in using it on the part of most participants, that figure is probably greatly exaggerated. On the other hand, not adequately included in current measures of the underground economy are those corporate profit-concealing procedures which are primarily via international transactions utilizing Eurodollar market facilities. Furthermore, if one allocates to the ever growing narcotics costs of business overseas and takes into account DEA's $45 billion net,[8] then one must allow that several billion dollars are clearly involved in illicit offshore transactions.

Such considerations led Professors Blum and Kaplan to a more conservative model in 1981 with only two parameters: limits set by U.S. foreign trade plus crime with overseas costs and capital. The basic premise is that offshore havens are not used without mechanisms being learned, and without access to adequate facilities and infrastructure. Essentially the assumption, is that one must be in or next to an ongoing criminal system before one can learn from others how to use it. Assume that the 1981 Simons and Witte $330 billion figure for the underground economy is correct. Assume that its "foreign trade" aspect can be no larger than the foreign trade aspect for the reported economy or 13 percent. Assume that the relatively unsophisticated, entirely domestic contribution of self-employment and small business is balanced by the heavily offshore narcotics and fraud trade, and the opportunity for corporations to hide profits offshore. If these assumptions are tenable, one arrives at an outer limit estimate for the external Euromarket aspect of the domestic underground economy, supplemented by corporate foreign trade income which also becomes part of that dark number, of $43 billion.

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[7] American Bar Association Preliminary Report on the Extraterritorial Application of U.S. Laws from the Ad Hoc Task Force on Extraterritoriality of the Section of International Law, April 24, 1982, p. 1.

[8] It has been shown in one set of field observations on drug users and traffickers (Blum 1972), where actual income figures were gathered, that prices paid and profits made were modest. These included groups engaged in international traffic. The work was done before the growth of the cocaine and marijuana markets. At that time, some of the "street price" might be "paid" by barter. Prices were subject to negotiation, costs of doing business were high, traffickers themselves were generally quite incompetent in business. It was the impression of the author that narcotics police tended to inflate their estimates of drug values considerably. We have done no recent studies of present narcotics prices but note that Dr. Carlton Turner, White House Advisor on Narcotics, was recently quoted as being skeptical about the $80 billion annual figure attributed to drug traffic.

Upper limits which range from a high $43 billion to a low $9 billion for 1982, based on an unproven model, do not generate confidence about the reliability of estimation. The Blum-Kaplan model gives no more encouragement to those who want to know how large the criminal aspects of the offshore market are than it has when asking how large the underground economy is, or how much is lost to taxes annually through non-reporting of income. Better estimates cannot be made until direct research is done on representative samples of organizations, criminal and corporate, and among taxpayers, to show actual income, costs and profits.

The secrecy afforded by nine Caribbean and South Atlantic English-speaking countries has its origin in either the common law or statutory law.

Common law secrecy prevails in those jurisdictions which were or still are British colonies. It derives from the finding, originally in the Tournier case in England, of an implied contract between a banker and his client that all of the customer's affairs will be treated as confidential. A violation of this implied contract subjects the banker to civil liability for damages for breach of contract; the burden of proof in such an action must be carried by the aggrieved client.

Two of the nine jurisdictions, the Bahamas and the Caymans, have confirmed or strengthened the common law rules by statute and have added criminal sanctions for breaching security.

Problems posed by the Cayman Islands

The Cayman Islands are today more widely known for their bank and commercial secrecy laws than any other country except their Caribbean neighbor, the Bahamas, and the prototype for all secrecy havens, Switzerland. Yet, the Caymans' secrecy laws are less than two decades old. Not until 1966—seven years after being transformed from a dependency of Jamaica to a direct colony of the United Kingdom—was bank secrecy initiated in the Caymans.

In that year, the Cayman legislature enacted as its own the essential elements of what was then, and still is, the secrecy law of its Bahamian neighbor. That section reads:

> 10. (1) Except for the purpose of the performance of his duties or the exercise of his functions under this law or when lawfully required to do so by any court of competent jurisdiction within the Islands or under the provisions of any Law of the Islands, no person shall disclose any information relating to any application by any person under the provisions of this law or to the affairs of a licensee or of any customer of a licensee which he as acquired in the performance of his duties or the exercise of his functions under this Law.

> (2) Whoever contravenes subsection (1) is guilty of an offense and liable on summary conviction to a fine not exceeding two thousand dollars or to a term of imprisonment not exceeding one year or both.

At first blush, this section appears to have imposed a duty of confidentiality on all bank employees that was enforceable with criminal sanctions. But a Library of Congress authority on Cayman law contends that in the context of the act, it could be argued that this section applied only to government officials who acquired information relating to the affairs of a bank's customers in preparing their audits or other reports. "In fact," this authority writes, "in 1979, the law was expressly amended to substitute 'neither the Inspector for a person authorized under section 8(4) to assist him' for the words 'no person.' Thus, section 10 is now of very limited application.[9]

Not so with the secrecy statute enacted in 1976 as a direct result of the Miami federal district court's holding in *United States* v. *Field* which proved unfavorable to the Caymans. In that year, the Cayman legislature passed the Confidential Relationships (Preservation) law and thus transformed the 1966–1979 bank secrecy law into a sweeping business secrecy law. The new statute was designed to cast a wider net, leave less room for doubt as to its interpretation, and render "misuse of confidential information . . . a criminal offense if committed in the Islands and even if committed outside the Islands in relation to Caymanian subject matter."

In the new act "confidential information" was defined as "information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge." The disclosure of such information became a criminal act punishable by a fine of 5,000 Caymanian dollars or imprisonment of two years, or both. Moreover, those penalties could be doubled against persons soliciting or receiving information for a reward. And they could be doubled again if the guilty party was a "professional person." "Professional persons" were defined to include not only bank employees, lawyers, government officials and "every kind of commercial agent" but also "every person subordinate to or in the employ of such person for the purpose of his professional activities."

The upshot of uncertainties about the scope of the Act was a 1979 revision setting out procedures for a bank or bank employee to follow when required to give evidence in a foreign proceeding that they must notify the Attorney General of the Caymans and then "apply for directions" from the Grand Court of the Islands. In deciding whether the foreign order should be complied with, the court is to hear the Attorney General, if he appears, and to consider the following matters: "(a) whether such order could operate as a denial of the rights of any person in the enforcement of a just claim; (b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy under this Law; (c) in any criminal case, the requirement of the interests of justice." As to the last point, if it uncertain whether tax evasion would be recognized as a sufficient basis for an order directing compliance. The Caymans do not impose an income tax and, therefore, evasion is not a recognized crime.

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[9] The 1976 statute may have been too sweeping. By 1979, it was considered to have two major flaws. Its broad wording could have led Caymanian courts to void parts of it as being too vague. Furthermore, the law was expressly deemed to have "no application" to "any professional person acting in the normal course of business." International tax lawyer Marshal Langer, in his 1979 book "*Practical Tax Planning*," wrote that "the extremely broad definition of 'professional persons' and 'normal course of business' might possibly have been construed to exonerate a banker, lawyer, or accountant who imparts information solely to government officials under compulsion." But whether a Caymanian bank's refusal to comply with a foreign court order for the production of documents could be defended under the 1976 act was left uncertain; such a defense is the purpose of having a bank secrecy law mainly designed to assist foreign persons. And despite its wide extraterritorial effect, the Act may have not achieved its primary goal of sealing off Caymanian banks and other businesses from the reach of U.S. and other foreign courts. The point appears never to have been decided by a Caymanian court or by the official Committee on the Privy Council, the highest appellate court for Caymanian cases.

But fraud is a crime in the Caymans as well as in the United States. And although fraud was the principal crime involved in a recent Colorado case, *United States* v. *Trenton H. Parker,* although Parker had waived his depositor's rights under the Caymans' bank secrecy laws, and although a New Jersey federal court ordered Barclays Bank in the Caymans to transfer no funds from any Parker account—despite all this, Barclays steadfastly refused for months to cooperate with federal prosecutors from Denver who sought access to Parker's records in that bank. In a 1982 report to the Department of Justice about his difficulties with Cayman authorities in the Parker case, the prosecutor wrote:

"Parenthetically it should be noted that the Grand Cayman judiciary has never honored a formal request for assistance from any United States court."

Nor, apparently, has the Caymans' sweeping Confidential Relationships (Preservation) Law in its original or amended form ever been tested by the Cayman courts, according to the Library of Congress authority. This authority goes on to make this myth-exploding observation about the law:

> The wording of the statute is, however, very plain with regard to one major feature. Rather than having an automatic "blocking statute," bank secrecy can now be obtained under the law of the Cayman Islands only through a court order. A bank can no longer claim in a foreign proceeding that compliance with a court's request for evidence *per se* be a violation of the bank secrecy law of the Cayman Islands. Releasing confidential information, in and of itself, is not an offense under the 1979 amendments as it was intended to be under the 1976 act. The blanket duty of secrecy of the 1976 act has been replaced with a duty to seek judicial assistance and to comply with orders that are to be made on a case by case basis. Thus, a person having a Cayman Islands account, trust, or corporation, cannot be guaranteed that the law will offer any shield in any prosecution. On the other hand, the Grand Court would probably block any "fishing expeditions" or investigations where actual criminal charges have not been filed.[10]

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[10] Analysis of bank secrecy laws prepared for the Subcommittee by Stephen F. Clarke, Senior Legal Specialist, Library of Congress.

In the Parker case, it is clear that, for whatever reason, this process as outlined by the Library of Congress was never played out; none of the issues reached any level of judicial consideration by the Cayman courts.

The Library of Congress expert contends, however, and the staff completely agrees, that it may be misleading to portray the 1979 amendments as having weakened the Cayman secrecy law. He writes:

> In cases where a foreign bank secrecy law has been raised as a defense to the enforcement of a United States court order for the production of documents or other information, it has been suggested that the courts should adopt a "balancing test" to determine whether the case is more directly concerned with the United States' national interest or those of the foreign country. Where a Cayman Islands court has already decided, however, that the local interests are more paramount, a United States court may be more reluctant to order compliance with the United States order under the general principles of comity of nations. Thus, depending upon how easy it is to obtain a blocking order in the Cayman Islands, the 1979 amendments might prove to be either a relaxing of the bank secrecy laws or a more sophisticated approach to frustrating attempts by foreign governments to obtain information relating to their taxpayers' affairs in the Cayman Islands.[11]

Secrecy laws of the Bahamas

In the Bahamas, bank secrecy is provided for in the following section of the Bank and Trust Company Regulatory act:

> 2. Section 10 of the Banks and Trust Companies Regulation Act, 1965, is repealed and the following section substituted—
>
> 10. (1) No person who has acquired information in his capacity as—
>
>> (a) director, officer, employee or agent of any licensee or former licensee;
>>
>> (b) counsel and attorney, consultant or auditor of the Central Bank of the Bahamas, established under Section 3 of the Central Bank of the Bahamas Act of 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;
>>
>> (c) counsel and attorney, consultant, auditor, accountant, receiver or liquidatory;
>>
>> (d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;
>>
>> (e) the Inspector under the provisions of this act, shall, without the express or implied consent of the customer concerned, disclose to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

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[11] Ibid.

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisidiction within the Bahamas, or under the provisions of any law of the Bahamas.

(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

This section was passed in 1980. Since its passage in 1965, the old section 10 had long been thought to have provided for bank confidentiality. But a 1975 Bahamian court decision, in *Barclays Bank* v. *McKinney,* held that the earlier section was actually applicable only to certain government officials and not to banks or bank employees.

A blanket type of bank secrecy law, the new section 10 prohibits disclosure in all cases where the customer has not consented to disclosure. It does not provide for a case by case review of foreign requests for confidential information by either a government official or a court. Technically, a Bahamian court may order compliance with the foreign order. However, there are no tax treaties, mutual assistance treaties, other cooperation agreements with the United States or any other such laws that would give a Bahamian court the grounds to order such compliance.

From the standpoint of Bahamian secrecy proponents, the Bahamian law presents a problem in that it appears to exempt from its ambit actions by a bank employee that are within the "performance of his duties." Thus, if a bank official were to comply with a foreign supoena and release documents or testify as to a customer's affair, it might be said that he was merely fulfilling a normal function and therefore was not guilty of a criminal offense. To date, this point has not been judicially considered.

Secrecy and international banking stability

In the recent past, the global financial system has been jolted by several events. In 1974, the Franklin National Bank of Long Island collapsed. In 1982, the Penn Square Bank failed. Over several years in the mid-1970s, Citicorp, the largest bank holding company in the United States and the largest foreign exchange dealer in the world, is said to have circumvented foreign bank and currency laws by improperly shifting at least $46 million in currency transaction profits from Citicorp branches in Europe, where taxes are high, to other branches in the Bahamas, where taxes on profits are lower. The 1980 collapse of the Australia-based Nugan Hand Bank and the 1982 failure of Banco Ambrosiano of Milan have already been noted.

One thread which runs through the Citicorp scenario and the bank failures of recent years is what one expert, Dr. Richard S. Dale, calls "the regulatory free-for-all [that] has contributed to the very grave crisis now enveloping the international banking system." [12] Walter B. Wriston, chairman of Citicorp, has said: ". . . The Eurocurrency market proved conclusively that, although the world may still be divided politically, it is one economically and financially. [13] But equally axiomatic is what Karen Lissakers of the Carnegie Endowment for International Peace declared in 1982 Congressional testimony: "Whereas banks and funds move freely across national borders, bank regulators do not." The result, according to Dr. Dale, is that "the present regulatory free-for-all creates an underlying competitive tension between national regulatory authorities that has contributed to the erosion of sound banking practices in international financial market." [14]

In such a loose regulatory environment, Citicorp "chose to play off one regulatory jurisdiction against another and to manipulate funds between its branches to escape such local controls as do apply," Mrs. Lissakers testified. She said she was "especially troubled by the attitute that a systematic violation of prudential and monetary regulations by U.S. banks in foreign countries is none of our business unless it specifically jeopardizes the soundness of the particular bank involved." That attitude appears to underlie the majority position in the Securities and Exchange Commission's 1982 split decision not to bring a civil action against Citicorp despite SEC staff findings of apparent wrongdoing.

The enforcement staff's findings, based on a three-year investigation, were overruled, first, by the SEC's general counsel, its director of the division of corporate finance and its director of the division of enforcement; and, second, by a 3-2 vote of the Commission (one member abstaining) not to bring an administrative action against Citicorp for failing to disclose foreign exchange trading improprieties. In a news release dated March 5, 1982, the SEC took the unusual step of setting out "the factors that influenced a majority of the Commissioners' decision"

"1. The allegations were not adequately established.

2. Even if established, the alleged amounts for the years in question were not material to Citicorp.

3. The Comptroller of the Currency had concluded that no action was warranted under U.S. banking laws.

4. The law concerning the disclosure of unadjudicated allegation is unclear. There would have been a serious possibility of court reversal of the Commission's actions, which would have been bad precedent.

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[12] Hearing, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, September 17, 1982.

[13] *Ibid*, quoted by Karen Lissakers.

[14] *Ibid.*

5. The case was old. The practices in question occurred in 1973 to 1978."

Many bankers argue that any attempt to control or regulate the laissez-faire Eurocurrency market or even disclose what the banks are doing would destroy the acknowledged efficiency of the present international financial system. They also say that any effort by the U.S. government to tighten the regulation of activities of U.S. banks more tightly would put them at a competitive disadvantage *vis a vis* European and Japanese banks.

IV. TAX HAVENS: DEFINITION AND EVOLUTION

Offshore facilities have come to be used for criminal purposes by reason of specific secrecy or blocking statutes, common law precedent, or sanctioned practice. In offshore jurisdictions, this means denying access (with varying degrees of exception) to information on accounts, money movements, identities of beneficial owners of bank accounts or those registered companies which are, most often, account holders and to business information of all types. Thus, one of the attractions of haven jurisdictions—secrecy as policy—is the core problem for U.S. and other law enforcement.

The imposition and continued defense of jurisdictional secrecy also creates a defect in this study and in other efforts to assess the magnitude of the offshore criminal funds flow problem, or to generate proposals from public cases or private confidences: one does not know how much money is involved, one does not often know what persons (corporate or individual) are involved, and one does not often learn the ultimate location of laundered funds. It is paradoxical, then, that a key feature—secrecy, generating a key problem, successful transformation of criminal money—denies that knowledge which would lead us confidently to recommend policies.

An offshore haven (the popular term is "tax haven") is characterized by several features. These are, as noted, the provision of secrecy with respect to offshore financial transactions and holders of accounts and beneficial ownership of companies, accounts or securities. Havens do not tax, or have very low taxation on foreign funds locally administered, whether held and invested or simply in transit from another country. Currency exchange controls are absent. Some havens also do not tax locally-earned funds. Typically, havens refuse to enter into international agreements which would override domestic secrecy laws, or would signal to foreign clients a positive view of information exchange even in criminal matters. Havens also are typically free from regulations governing banking practices: generally, reserve requirements, loan-to-asset ratios, or interest rate controls. In some locales, bank license applicants are not required to meet a specific net capital requirement or demonstrate banking experience, probity, prior non-criminality, assets, or legitimate banking intent. License application fees may be low. In a few jurisdictions bank licenses have been granted without any authoritative governmental supervision and companies are registered by local law firms in blocks.

In most jurisdictions, international banking is separated from local commercial banking; there is a range of allowed and disallowed functions. Banks enjoying "offshore" status are not allowed to do local commercial business. These banks may not be subject to audit of any kind. Indeed, in one offshore banking center, the offshore banks have such a spotty reputation that the local commercial banks will not even grant them checking accounts.

Corporate activities (that is, registered companies and also trusts) may enjoy privileges beyond capital, transaction, and beneficial ownership concealment. These would include, for example, absence of a disclosure requirement on ownership of a holding company, on required annual reporting of any kind, no audits or disclosures of stock ownership, including transfers, or dividends. In some jurisdictions, registered companies may also act as trust companies, or finance companies—indeed as banks themselves—and may act as mutual funds or as security investors or brokers without regulation from the host or "headquarter" country. Incorporation fees may be very low. Ownership quite often is held in the form of bearer shares. Furthermore, for purposes of back dating, one may buy "off the shelf" "matured" shell companies which have been registered earlier. A Panamanian lawyer told the staff that his firm sold many such companies. They merely paid the annual fees on a few older shell companies until a buyer appeared to need, for example, a company at least five years old. Hence, in the most extreme case a bank or registered company may have been legally established may pay an annual fee, but there may be neither a public nor protected record of its existence, with only its agents attesting to its legal status.

None of the foregoing features are constant among havens. The rule is not for uniformity, but diversity within certain general parameters: (a) confidentiality of records, (b) low cost of operations, including taxation, and (c) freedom from regulation by the haven for activities offshore.

For some bank depositors, convenience is an absolute standard. It may apply in respect to the ability of facilities to handle large amounts of cash, to engage electronically in international transfers, to be viewed as reliable with respect to their fiduciary responsibilities, and to be able to serve as world-wide portfolio managers.

Havens, as opposed to financial centers, are generally less developed countries/colonies, or are relatively undiversified economies strongly dependent on finding specialized economic niches in order to survive. Consequently, expatriate managerial and technical personnel are often required; depending on law, work permits may be required for them as well as adequate residential/health/transport facilities. But it may be local government convenience, subject to the winds of politics or threats of extortion, which determines whether or not Bank A will have the work permits of its expatriate managers renewed.

Another important feature of convenience and investor security is language. English is the universal language of the world today and, in a preponderance of havens, English is either the native language or is a common second language to the business elite.

A haven is also to be defined, in utilitarian terms, by learning for whom its laws, facilities, accessibility, infrastructure, socio-political milieu and informal procedures present an advantage over any other jurisdiction in which it is also possible to do financial business.

Different governments tend to be preoccupied with different havens. Thus France, Italy and Argentina are concerned today with jurisdictions offering haven to flight capital, i.e., to individuals violating currency control regulations. Israel is concerned with nations providing banking facilities for indigenous terrorist arms purchases. EEC countries are concerned with havens providing a profit center for industries illegally profiting by violating Common Market rules. The United States, unlike all but one or two other nations, tends to be primarily concerned with tax evasion, but also must deal with drug trafficking, corporate slush funds, organized crime, pornography, union racketeering, securities and commodities fraud, bank fraud, health care fraud, management theft, and a host of other onshore activities in which unreported profits are exported offshore to escape detection and successful prosecution.

Given these variations and their preconditions, those havens which are of concern to law enforcement authorities do have elements in common. Law enforcement distinguishes haven nations of interest in this study from a large number of others which, by economic or legal standards, are "havens" through their provision of tax incentives or regulatory conditions, the utilization of which involves no criminality. Similarly a well regulated offshore financial center (New York, London, Singapore) is not ordinarily considered. Typically, Jordan, Greece, Puerto Rico or Hungary are excluded from concern, even though they provide profit incentives to foreign business. Indeed, most activities by foreign persons in most havens are entirely free from criminal taint, for the primary functions of havens are entirely lawful viewed from any international perspective.

How a jurisdiction goes about securing offshore business which, in one or another foreign country has illegal aspects, depends on the location, morals, and ingenuity of that host country. A haven country competes economically by attracting foreign investment to utilize its banking facilities and registered companies. It intends, through law and practice, to protect the investments and the investors from harm or loss inflicted by any foreign country of which these investors are residents, citizens, or in which they are economically active. It provides supporting services, from utilities through diplomatic intervention.

However, any haven which exploits a competitive advantage over a neighbor country is not necessarily immoral, even when judged by American standards. The Swiss secrecy law was enacted in response to actions by the German Nazi government seeking to acquire the assets of fleeing, or holocaust-annihilated Jews. Few would not applaud this Swiss response. The common law precedent which underlies British Commonwealth bank secrecy, *Union* v. *Tournier,* (1907) dealt with the duty of a banker to treat his customers' financial affairs as confidential. It stresses his fiduciary responsibility. Similarly the protections accorded to beneficial owners whose companies are established and represented by attorneys in haven countries represent an exercise of lawyer-client privilege widely accepted in the havens and elsewhere.

Expansion of the Euromarket

The Euromarket expansion has been phenomenal in recent years.[15] It expands at a rate of growth two to three times more rapid than that of most domestic markets in major countries and U.S. dollars continue to account for about 80 per cent of the currency in the market.

Whereas the first U.S. bank foreign branch established by J. P. Morgan in 1846, and slow expansion occurred thereafter for a century, the bank expansion boom has been parallel to the growth of the market itself. In 1965 there were only five U.S. bank branches/subsidiaries in the Caribbean; today, worldwide in havens and financial centers with haven characteristics, there are 800 U.S. bank foreign branches with assets of $350 billion, and there are about 1,000 subsidiaries, with those of the 200 largest U.S. banks accounting for 90 per cent of the assets of $82 billion.[16]

The Euromarket, as of December 1981, had gross assets of $1.8 trillion. There has been annual growth, 1979 through 1981, averaging $300 billion annually.[17] A projected value for the gross assets of the market for 1982 would then be $2 trillion. At present rates of expansion, within a decade the Euromarket could conceivably approximate the size of all domestic combined markets.

The most rapid growth within the Euromarket is in the Caribbean (geographically defined to Panama and Bermuda). For example, in 1964 the Cayman Islands had two banks and no offshore business operations. In 1982 the Caymans had 360 branches of foreign banks, over 8,000 registered companies, and more telex machines per capita than any other country in the world. Panama had foreign assets in excess of local credit needs (a measure of haven activities) of $0.1 billion in 1970, and $14.6 billion in 1978. A May 1981 IRS estimate shows that foreign deposit growth in the Netherlands Antilles and Caymans 1975–1978 was 300 per cent as opposed to Switzerland, with a 100 per cent increase in 1975-1978.[18] Switzerland nevertheless remains important for it is estimated (Blum 1981) to have held, in 1978, almost half of the then about $118 billion in private sector (corporate, individual) deposits within the system, and from $80 billion to $200 billion in non-deposit, unreported "securities/advisory" or fiduciary (trust) accounts for the private sector. In addition, as of 1978 Switzerland accounts for about three-fourths of all foreign tax haven investments in the United States. In that year Swiss "residents" received about 43 per cent of all reported United States gross income paid to aliens. Most of these investor entities are corporations.

Swiss data for 1977 yield the conclusion that funds flows involving Switzerland and other haven nations are greater than flows involving Switzerland and the rest of the world.[19] Roughly 57 per cent of Swiss transactions occur with haven nations or with financial centers having haven characteristics (e.g., London, Hong Kong). Consider, for example, that Luxembourg's outstanding balances with Switzerland were on the order of 11.7 billion Swiss francs ($7.3 billion) compared to the United States with a balance of 2.1 billion francs ($1.3 billion). Other examples of this intrahaven money movement show the Caribbean and Central America *vis-a-vis* Switzerland with balances of almost 15 billion francs, and the Netherlands (including the Netherlands Antilles) of 10.6 billion francs. This illustrates preponderant money movement within the Euromarket itself, with the Caribbean-Swiss link looming ever larger. When examining actual funds flow, as for example in a money laundering situation, it is typical for funds to flow through at least two overseas intermediary locales as stepping stones before reaching a final destination. Is this funds shuffle always evidence of criminal activity? Perhaps not; international bankers have told us that the use of "stepping stones," may occur in a typical legitimate tax avoidance situation. One example given us is profit maximization through transfer pricing—a weak use indeed since such book entry transfer pricing probably constitutes tax evasion, not avoidance.

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[15] According to BIS reports (BIS, January 1982) international banking business expansion for 1981 exceeded the expansion for 1980.

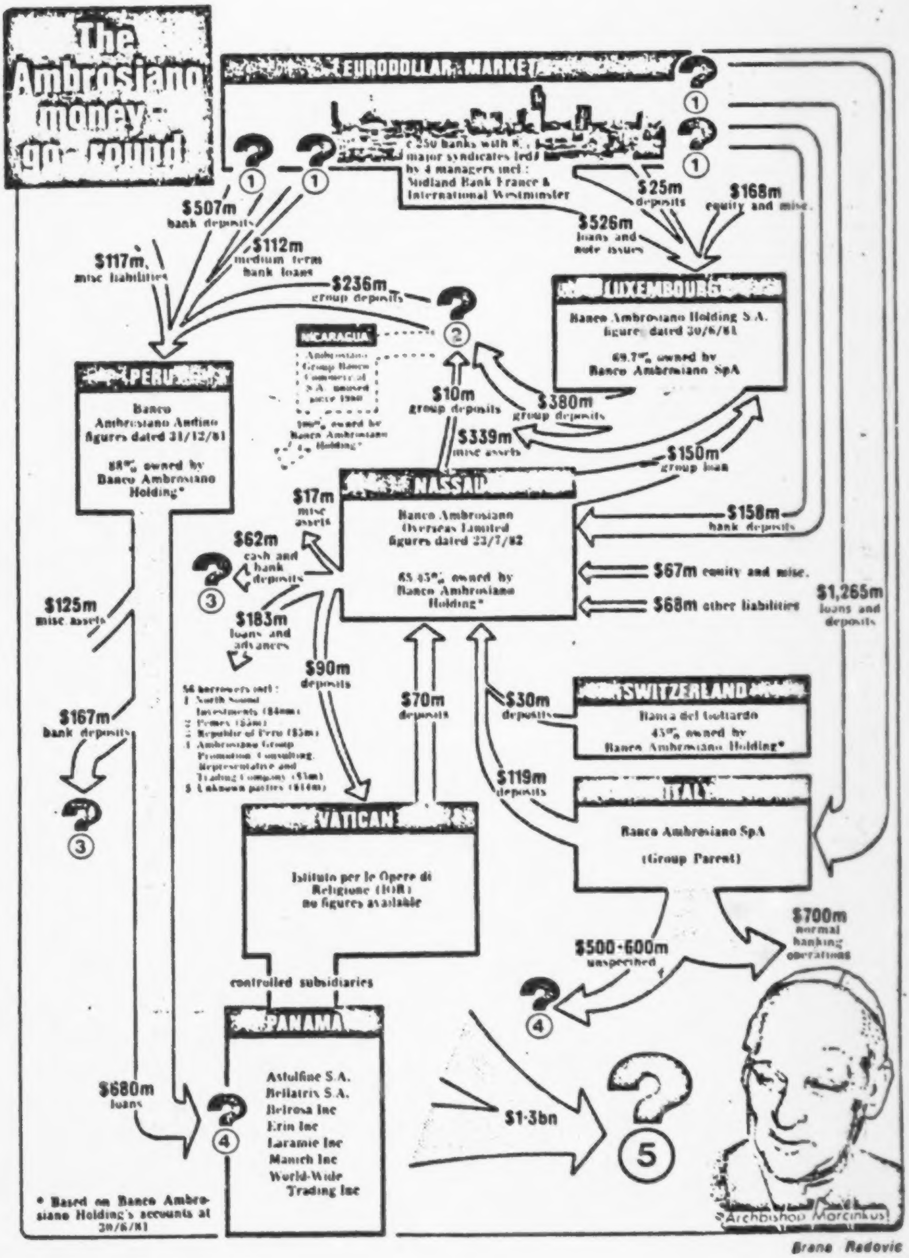
[16] U.S. Federal Reserve figures, 1982.

[17] "World Financial Markets," May 1982.

[18] Almost all increase in Caribbean use with respect to U.S. accounts is attributable to corporations rather than to individuals.

[19] R. H. Blum and John Kaplan. Offshore Banking: Issues with Respect to Criminal Use. Paper prepared for the Ford Foundation, November 1979.

It is appropriate to link this general discussion to a specific example of money movement involving European-Caribbean links, an example which signifies the darker side of the Euromarket with which we are concerned. We reproduce here the funds flow chart presented in the London Financial Times, August 5, 1982 in its coverage of the scandal of Italy's Banco Ambrosiano. That bank collapsed, $1.4 billion disappeared, and the central banking system was shaken. Widespread fraud is suspected but the investigation has been blocked by secrecy regulations in Panama and the Bahamas.


The Ambrosiano money-go-round
EURODOLLAR MARKET
c 250 banks with 8 major syndicates led by 4 managers incl.: Midland Bank France & International Westminster
①
$507m bank deposits
$112m medium term bank loans
$117m misc liabilities
$236m group deposits
②
$25m deposits
$168m equity and misc.
$526m loans and note issues
LUXEMBOURG
Banco Ambrosiano Holding S.A. figures dated 30/6/81
69.7% owned by Banco Ambrosiano SpA
NICARAGUA
Ambrosiano Group Banco Commercial S.A. owned since 1980
100% owned by Banco Ambrosiano Holding*
PERU
Banco Ambrosiano Andino figures dated 31/12/81
88% owned by Banco Ambrosiano Holding*
$10m group deposits
$380m group deposits
$339m misc assets
$150m group loan
NASSAU
Banco Ambrosiano Overseas Limited figures dated 23/7/82
65.43% owned by Banco Ambrosiano Holding*
$17m misc assets
$62m cash and bank deposits
③
$183m loans and advances
56 borrowers incl.:
1 North Sound Investments ($84m)
2 Pemex ($5m)
3 Republic of Peru ($5m)
4 Ambrosiano Group Promotion Consulting, Representative and Trading Company ($3m)
5 Unknown parties ($14m)
$158m bank deposits
$67m equity and misc.
$68m other liabilities
$1,265m loans and deposits
$125m misc assets
$167m bank deposits
$90m deposits
$70m deposits
$30m deposits
SWITZERLAND
Banca del Gottardo
45% owned by Banco Ambrosiano Holding*
$119m deposits
ITALY
Banco Ambrosiano SpA
(Group Parent)
VATICAN
Istituto per le Opere di Religione (IOR)
no figures available
$700m normal banking operations
$500-600m unspecified
④
controlled subsidiaries
PANAMA
Astolfine S.A.
Bellatrix S.A.
Belrosa Inc
Erin Inc
Laramie Inc
Manich Inc
World-Wide Trading Inc
$680m loans
$1·3bn
⑤
* Based on Banco Ambrosiano Holding's accounts at 30/6/81
Archbishop Marcinkus

Brano Radovic

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Euromarket banking controls

Arguably, there are five kinds of controls over offshore banks.

One is individual, reflecting the philosophy and ethics of local bank managers and personnel as they work within the framework of the policies of the headquarters banking firm, for almost all Eurobanks are branches of major international firms headquartered in commercial nations. The following letter from the Turks and Caicos Islands branch of Barclays Bank is illustrative of this type of control:

BARCLAYS International

(INCORPORATED IN THE UNITED KINGDOM)

Barclays Bank International Limited
P.O. Box 61
Cockburn Town
Grand Turk
Turks & Caicos Islands
West Indies

14th May, 1979

Mr. F. F. Dempsey,
Attorney at Law,
Grand Turk.

Dear Sir,

As you might have occasion to refer to us clients of yours who wish to open accounts, we thought we would inform you of the Bank's policy with regards to the opening of accounts in the names of banks or similarly titled institutions, or for institutions purporting to be engaged in banking or quasi banking business.

Before any such accounts can be opened, we need to know the beneficial owners of the company and we need reports from reputable banks on all directors and managers of the company. The investigation on the parties concerned could take at least a month and even after the investigation, we reserve the right to refuse to open an account.

We are not interested in doing business with companies which are established for the following purposes:-

(1) to circumvent the exchange control regulations of another country,

(2) to evade income or other taxes in another country.

We may consider dealing with companies established to avoid tax in another country, but only after the bona fides of the principals has been established and satisfactory references are held. In addition we would require a written opinion from a reputable firm of lawyers in the country of residence of the principals, confirming that the particular transaction is within the law of the country concerned.

We are not trying to be difficult, but recent experience have forced us to be extremely cautious.

Instead of sending us completed mandate forms, we would prefer if the clients were first of all referred to us to provide references. In this way, clients would not get the impression that accounts will automatically be opened once a company has been registered.

Yours faithfully,

R. I. ESCALANTE,
MANAGER.

RIE/ms

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A second kind of control is exercised by the policies and degree of implementing supervision of the headquarters bank itself. Major international banks appear to differ widely in the restraints they impose on branch staff.

A third set of controls derives from the policies of national monetary authorities or central banks, and other public authorities, with respect to offshore operations. In the U.S. these are the Federal Reserve, Comptroller of the Currency, Securities and Exchange Commission, the U.S. Treasury, and the Internal Revenue Service. All exercise controls affecting U.S. offshore operations. There are considerable differences in the extent and kind of regulation nationally which in turn affect the offshore operations of all international banks headquartered in a given nation.

A fourth set of controls are those locally imposed by the jurisdiction in which the offshore branch is domiciled. As earlier noted, these controls are expressed by law, administrative regulation and informal practice. The last is sometimes paramount, for it may determine whether law and regulation are really operative, and also it defines the range of opportunity and discretion.

The fifth set of controls is functional, defined by the marketplace itself and the needs arising from its competitive nature. Included here are controls on the volume of funds available as a function of capital and assets. Functional controls are also to be found in the characteristics of each jurisdiction, for resources and facilities set limits on what is possible and selectively determine what specializations become advantageous.

There are two major sets of controls noticeable for their absence. One is the absence of municipal regulation. Second is the absence of that substantive system which is sometimes sought internationally, i.e., an effective international authority. International banking institutions do exist, as, for example, the International Monetary Fund, the World Bank and the Bank for International Development, the Bank for International Settlements, etc., but none of these act, nor is it ordinarily suggested they should act, as regulators of Euromarket transactions, except as these may be incorporated into national or institutional policies of interest to those lending or settling authorities.

The unregulated nature of Eurobanking has led to consideration within the world economic and monetary community of several kinds of risks or costs. It is beyond the scope of this study to consider these in detail but many do exist.[20]

Criminal risk imbedded in major Eurobanking issues

The issues which have gained attention among the central bankers and government economists, and which are now, because of a potential world crisis, matters of public awareness, are integral to our own concerns with the criminal abuses of the offshores. Regulatory status, secrecy statutes and international cooperative stance are parameters which account for the presence or absence of criminal opportunities, just as they create free market commercial ones. Furthermore, concerns about solvency and prudent risk, even inflationary contributions which are evaluations of status or impact of Euromarket banking per se, are themselves affected by criminal activities. Imprudent lending occurring within a fabric of corrupt relationships, solvency failures arising from systematic looting, inflation assisted by counterfeit or kited monetary instruments or illegal monies competing for limited resources; these are all criminal effects.

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[20] For fuller treatment of the Eurobanking issue, see R.Z. Aliber, Monetary Aspects of Offshore Markets, "Columbia Journal of World Business," Fall 1979; "American Banking," 1980; G. Dufey and I.H. Giddy, the Unique Risks of Eurodollars, "The Journal of Commercial Bank Lending," June 1978, pp. 50–61; Elie el Hadj, The Economics of an Offshore Banking Centre, "Euromoney," September 1979; S.J. Khoury, "Dynamics of International Banking," New York: Praeger, 1980; H. Mayer, Credit and Liquidity Creation in the International Banking Sector, BIS Economic Papers, No. 1. November 1979, Bank for International Settlements, Basel; M.E. Mendelsohn, BIS Stresses Euromarket Supervision, "American Banker,"April 18, 1980, and That Sinking Feeling, "The Banker,"January 1979; H.C. Wallich, Why the Euromarket Needs Restraint, "Columbia Journal of World Business," Fall 1979, pp. 17–24; "World Financial Markets,"1979.

There are several suggested remedies affecting Eurobanking per se which attempt to meet the needs raised by Prof. Harvey Dale, the Bank of England's Peter Cooke, and others. At one end of the spectrum is a new international agency supported by a network of treaty or administrative agreements which would serve to regulate Eurobanking as such through the legislative and central bank apparatus of those major nations whose international banking branches and subsidiaries constitute most offshore banks and banking. Less embracing is the call for improved supervision through the Bank for International Settlements, and via all major national central banks. While local legislation or amendments to banking practice administrative codes might be required, the supervisorial emphasis is the nearer possibility. The third more lenient option is for increased informal cooperation within existing structures and regulations—that necessarily a policy of reaction to specific problems (whether bank solvency or criminal monies flow) rather than being a policy of prevention. The fourth position, argued by offshore havens, by many economists invoking doctrines of "substitution" (cut off one octopus tenacle and another grows, or pressure the balloon on one spot, it expands elsewhere), and by Western governmental officials or diplomats who foresee greater costs than benefits, is inaction.

The invisible Eurobank issue: Crime

In our search of the literature, we have found that few banking authorities address the issue of primary concern to us here: criminal uses of Eurobanking. That fraud in banking is known to be serious cannot be doubted; however, it is noteworthy that those concerned worldwide with prudence or with threats to national interests in the Euromarket do not ordinarily include criminality among their interests. An exception is H.J. Muller's 1980 paper on banking law and economic crime. (Since Muller is Director of the Swiss Banking Commission his focus is important.) He addresses his attention to parasite banks (involved in conflict of interest), speculating banks (as with foreign currency), "the bank in the bank" (where management diverts foreign funds to its "private" bank), and insider trading. The last, while not illegal in Switzerland, apparently will soon be prohibited by legislation now being prepared. Muller also examines the bank as victim rather than perpetrator of crime.

The very guardians of the system, the central banks themselves, have apparently remained aloof from any public suggestion that their mandate might include encouragement of those banking ethics. Two central banks—the Swiss National Bank and the Bank of England—appear as exceptions.[21]

In today's world this disinterested central bank stance is held by some to be irresponsible. Central bank intervention must, these advocates state, go beyond monetary policy to such education and legislative initiatives as are necessary to expand the prudential interest to include attention to criminal uses and related corruption within the Eurobanking context.

Some argue that it is not the business of central banks to concern themselves with any but those regulatory functions in economic realms which now constitute their mandates. The argument is essentially that financial activities as currently defined, are the only proper focus for central banking. After all, Central Bankers have work enough to do as they address the very serious economic Euromarket issues, including the stability, perhaps solvency of now highly exposed (i.e., loan exposure) commercial banks worldwide. Furthermore, that work is best done cooperatively, within the community, and best by consensus, not with a policeman's stick.

Another argument is that significant criminality will always be found under just those free market conditions which are efficient. Just as the benefits of the Euromarket arise from underregulation (compared to other jurisdictions), i.e. provisions of secrecy, free funds movement, no taxation, limited audit or other supervision, so inevitably arise the costs including criminal advantage taken of opportunities inherent in the structure.

Serious doubts are expressed that central banks, even were they to expand their mandate to efforts to control those offshore banking activities in league with criminals, or of locally corrupt nature, could be effective. Implicit is the premise that no reasonable form of banking supervision can reduce international business-type crime—or local corruption—in which bank management is a witting partner, or is indifferent to the source and use of funds.

An alternative expression of this resistance to expand central bank responsibility is the contention that the costs of offshore control necessary significantly to impede criminal funds flow would be extraordinary high as noted by a European central banker:

> In reference to the channel of influence which exists between a "parent" central bank and a haven branch bank via its head office in a supervised center, consider that the parent central bank can . . . exercise some remote prudential control over the branch's banking practices, through the consolidated balance sheet of the parent. Ethical influence, however, can only be exerted by the head office, and that subject to local customs and attitudes. To suggest that a central bank could exercise authority directly over a

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[21] The position of the U.S. Federal Reserve Board with respect to ethical matters regarding U.S. subsidiaries/branches in offshore centers is not clear. Neither our interview data, nor published materials, allow a conclusion as to any consensus within the FRB of such an expanded definition of central bank responsibilities. Senate Banking Committee hearings in 1983, however, indicated a willingness in the Senate to require more regulation of U.S. bank loans to foreign countries.

> moral behavior of persons working and resident in a foreign country suggests powers which go far beyond its legal and constitutional abilities. The practical difficulties of staffing such a function, and the cost of so doing . . . makes the mind boggle. Even if it were possible to exercise such distant influence it would not impringe upon the operations of the 'private' bank owned by an individual in a minor haven. The greatest safeguard against the improper use . . . would be an adequate local vetting procedure prior to incorporation supported by appropriate local control and supervisory arrangements, something which "parent" central banks . . . are powerless to enforce. That adjustment is . . . to work streadily and constructively on the self interest and self motivation of the local authorities. The short term, externally applied solution will at best suppress the problem temporarily, leaving the local will unchanged. Nor will central banks in some countries outside the U.S., contemplate undertaking a detailed inspection of branches in another jurisdiction, and still less of subsidiary companies incorporated there, when the central bank does not exercise such functions domestically.

In weighing the arguments pro and con, it is clear that there would indeed be increased costs were central bank mandates to be expanded. On the other hand, it is our belief that the threat to confidence and, indeed, solvency which is posed by existing offshore banking relationships to criminal figures, and to local politicians, does itself bear on traditional central bank responsibilities. The nature of these threats appears to be expanding, for surely 1982 represented the year of greatest discovery, convictions, loss, and scandal through overseas operations (Nugan Hand, Ambrosiano, Amford, Citibank, Swiss insider trading, etc.). It is therefore our position that central banking can no longer afford to limit its attention to traditional forms of intervention and control.

United States international banking facilities (IBF's) [22]

On December 3, 1981, the Federal Reserve Board authorized the creation of International Banking Facilities (IBF's) in the United States. The FRB officially defined an IBF in these words:

> "International Banking Facility" or "IBF" means a set of asset and liability accounts segregated on the books and records of a depository institution, United States branch or agency of a foreign bank, or an Edge Act of Agreement Corporation that includes only international banking facility time deposits and international banking facility extensions of credit." (12 C.F.R. S. 204.8(a)(1) published at Fed. Reg. 32429 (1981).

In effect, the FRB authorized domestic offices of banks that engage in wholesale international banking activities to become tax havens. These are offices at which the banking entity's Eurodollar transactions are booked. Operating primarily as a record keeping entity, an IBF is similar to an offshore shell branch. Thus, the new IBF's do not displace any existing international banking institutions but, to the contrary, they supplement such entities by allowing them to participate in the Eurodollar market with a minimum of regulation. The FBR implemented the plan by amending Regulations D and Q of the Federal Reserve to eliminate reserve requirements and interest rate ceilings on certain deposits of foreigners in U.S. banks.

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[22] This discussion is excerpted from "International Banking Facilities—New Competition in Eurodollar Markets?" by Bowman Brown and Gregory J. Willis, in "Banking Report," Summer 1981, pp. 262-278, and from other publications as cited.

At the time the IBF regulation took effect, almost 200 U.S. banks and U.S. subsidiaries of foreign banks had applied to establish IBFs. A little more than half, or about 115, are in New York. Others are in major cities across the United States, including Miami, Chicago, New Orleans and San Francisco. A number of others were expected to apply.

The Eurocurrency market is estimated to be about $1.6 trillion a year. Some FRB economists predict that as much as $125 billion of this business would be transferred to the new IBFs in the first few months of 1982. Morgan Guaranty Trust estimated that the IBFs share of the total Eurocurrency market could reach 10 to 15 per cent of the $1.6 trillion in a few years. Most of this business has been transacted in such far-flung financial centers as London, Singapore, Bahrain, Bahamas and the Cayman Islands. Eurocurrency refers to any country's currency on deposit outside that country.

The biggest immediate benefit is to U.S.-based banks, many of which established Caribbean offices in the 1970s to carry on their tax free business. While IBFs are not expected to put these Caribbean offices out of business, the growth is expected to be in the U.S rather than in the islands.

Access to the IBFs is limited to individual non-U.S. residents, foreign corporations, foreign banks and foreign subsidiaries of U.S. corporations. Depositors on the IBF books are not subject to U.S. interest-rate ceilings. But IBF's cannot be used to finance activities in the U.S. Deposit must stay on the books for at least two days, a restriction which some view as a hindrance in a market where billions of dollars move overnight to catch every blip. Bankers say that perhaps the most significant restrictions are those prohibiting IBF's from issuing negotiable instruments and the potential for paying premiums to the Federal Deposit Insurance Corp., which insures U.S. bank deposits. The prohibition against issuing negotiable instruments is designed to ensure that these funds do not wind up in the hands of U.S. residents who might buy the instruments in a secondary market. The minimum transaction is $100,000.

On December 16, 1981, however, the FRB did allow IBFs to purchase in the secondary market assets such as loans, securities, Euro-CDs and bankers' acceptances which would ordinarily be considered in eligible assets for IBFs. The IBFs would be permitted to sell such assets to domestic and third parties. But bankers would have to ensure that the proceeds and loans, securities or bankers' acceptance would be used only to finance operations outside the U.S.

To encourage establishment of IBFs, many states—including New York, Connecticut, Florida, California, Georgia and Maryland—have passed laws exempting IBF deposits from state and local income tax. Banks are subject to federal income tax on earnings generated from the IBFs. It is estimated that there is between $90 billion and $100 billion in Eurodeposits cruising around the Caribbean, a large part of which Miami's IBFs hoped to get.

It is estimated that $4 of every $10 deposited in Miami banks generally comes from abroad, much of it from Latin America. (The accepted total for Latin deposits in Miami is $4 billion.) One senior banking officer in New York said of the advent of Miami's IBF: "It's going to be the biggest laundering game in history." There is some speculation that Miami may become the nation's second international banking center after New York.[23]

In Britain, Switzerland and other European countries, free international financial markets have developed spontaneously. There, offshore transactions are not artificially segregated on books and records and no special favors are granted to such transactions. In these markets, a variety of restrictions are imposed on transactions in domestic currencies, but those in foreign currencies are free from restriction.

In such centers as Singapore and Bahrain, on the other hand, the authorities have artificially created offshore banking units, segregated offshore transactions on books and records, permitted them to conduct free transactions, and imposed lower corporate taxes compared with those on domestic transactions. Hence, IBFs in the U.S. may fall into the same category as the markets in Singapore and Bahrain.

In other offshore banking centers, transactions are mainly in foreign currencies, while IBF business will be done largely in the domestic currency, i.e., in the U.S. dollar. So, the IBFs' bearing on the gigantic domestic market cannot be overlooked, even though offshore transactions will be separated from domestic transactions.

The creation of IBFs in the U.S. represents a change from policies of only a few years ago when the U.S. tried to discourage expansion of the Euro-market by the introduction of reserve requirements. It appears that the U.S. has determined that trying to keep a rein on the Euro-market is unrealistic and that the IBF system will enable U.S. authorities to monitor offshore transactions in a more tangible way and minimize obstacles to the pursuit of monetary policy by separating domestic finance from offshore banking business.

Expectations about IBFs range widely:

John Rice, a Citibank vice President: "It won't put the Caribbean offices (of U.S. banks) out of business, but the growth will be in the United States rather than in the islands . . . (The total size of the Eurocurrency market is not likely to be affected by IBFS). . . The Euromarket, itself, has been growing at a phenomenal rate and that will continue. It's impossible to measure how much is due to the IBFs, compared with growth that would have occurred anyway."[24]

A recent report by Morgan Guaranty Trust Company of New York stated: "Considerable uncertainties are involved in estimating the potential size of the IBF operations, including the amount of business drawn from other Eurocurrency market centers," the "uncertainties" centering on restrictions on IBFs that other free trade zones don't have." [25]

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[23] "Will hot money spoil Miami?" by Nicholas Asheshov, "Institutional Investor," September 1981.

[24] Wall Street Journal, November 30, 1981.

Robert D. Jackson, vice president of the Chemical Bank, was quoted as saying: "This is quite an event. We'll be able to bring back to the United States a lot of foreign business that went offshore." [26]

Lawrence R. Uhlick, vice president of Morgan Guaranty Trust Company, told the New York Times: "It could be the best of both worlds. New York's position as a financial center will be enhanced," he said, "and foreign depositors will feel more comfortable maintaining dollar deposits in the United States." [27]

Muriel Siebert, New York State Superintendent of Banks, who pushed for state legislation permitting IBFs in New York: "This is great for New York. It can get back some of the business that has been lost to other offshore centers." [28]

An unidentified official at the Federal Reserve Board in Washington: "Understand that the IBF is an intellectual concept more than anything else. The facility is going to be in somebody's drawer. The IBF simply recognizes what is going on anyway, in the Cayman Islands and in London, and if you can't beat 'em, join 'em." [29]

James Boisi, vice chairman of the board and a director of Morgan Guaranty Trust was quoted as saying: "Greater efficiency, greater cost-effectiveness, and a great reduction in sovereign country risk will attract more business to American shores. I do not believe however, that the IBF will close down London, Nassau, or the Cayman Islands," noting that European syndications would "undoubtedly remain in London: so, too, would the Eurodollar CD market, given the U.S. prohibition againt bearer demand instruments." [30]

Robert M. Hill, chairman of Morgan Guaranty International Bank, an Edge Act subsidiary commented: "I would think that over time, we would see a shift of Western Hemisphere syndicated loans from London to New York." He thought a very significant amount of assets would be bought back from Nassau, which is in the same time zone as New York. "Over time, I think New York will rival London, but in terms of other offshore centers, I don't think we'll see much of a shift," noting the immense time zone differential between New York and Hong Kong, for example. But New York has a distinct time zone advantage in terms of South America and Canada, noting that major syndicated loans had been made recently to several of the Canadian provinces, Mexico, Argentina and Brazil. "The first step is to bring assets into the IBFs, and essentially, there are two sources—Nassau and the Cayman Islands, and foreign loans on the New York books. Syndication is a very sophisticated type of activity. We want to make sure the assets are in place and the IBFs are working before we bring in that business. We would move it very carefully."[31]

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[25] Wall Street Journal, November 30, 1981.
[26] New York Times, November 22, 1981.
[27] New York Times, November 22, 1981.
[28] New York Times, November 22, 1981.
[29] Euromoney, October 1981.
[30] Euromoney, October 1981.

The Wall Street Journal quoted Yasushi Watanable, deputy president, Bank of Tokyo, as saying, "The U.S. financial reform (IBFs) will have a profound international influence, because of the strong U.S. position in the world economy, the openness of its financial system, and the extensive use of the U.S. dollar as an international currency, which is closely related to the first two features. The international influence will be even greater; creation of IBFs means the establishment of offshore banking centers in the United States where international financial transactions, not subject to U.S. banking regulations in many respects, will be conducted mainly in U.S. dollars, and, therefore, is most likely to bring about a drastic change in the tide of international banking centers in the Bahamas and the Cayman Islands in the Caribbean will be transferred to IBFs, except for transactions with U.S. residents. But any massive transfer of business to IBF's from Western European centers, especially London, and such Asian centers as Singapore, and international financial centers in the Middle East, seems unlikely in the short run, in view of the geographically easier approaches to customers, differences in time, ability to innovate new financial services, or closer ties with other financial facilities. Over the long and medium-term, too, these offshore banking centers will survive, though their shares may decline."[32]

Dr. Wilfried Guth, Deutsche Bank, Frankfurt, West Germany, opined: "[Creation of IBF's in New York] will mean competition with other international financial centers. However, I do not think that New York will draw substantial business from London, Luxembourg, Singapore or Hong Kong. It seems more likely the Caribbean offshore centers will lose importance."[33]

Given these views of various experts the fact is that IBF deposits already amounted to $164 billion by February 2, 1983, according to data supplied to PSI by the Federal Reserve Board. Since this amount exceeds deposits in such havens as Panama and Bahrain, it is clear that IBF impact has been substantial and its potential is still enormous.

Economic crises and historical parallels: Related argument internal to the United States

There is arising a parallel issue to haven secrecy which is internal to banking within the United States. It is the U.S. government agency inspection findings.

The traditional relationship between banks and the Federal Reserve as central bank is that of a closed community; troubling data is not released, it is argued, so as to avoid public anxiety or panics contributing to "instability." Those who must insure depositors may, on the other hand, take a public interest view, being less concerned with anxiety than the rights of depositors and investors to be informed so that they may act self-protectively. That philosophy is the same one which has guided the policy to the SEC.

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[31] Euromoney, October 1981.

[32] Wall Street Journal, September 28, 1981.

[33] International Banking: the next phase: "The Banker," October 1981.

It is useful to consider the historical parallel between the crash of 1929 and the subsequent Great Depression with its locus in the stock market, to the present fears of a worldwide banking collapse given the unregulated Euromarket. In 1929 regulation and the SEC philosophy followed the collapse. In 1983 we find concerned agencies arguing for remedial regulation in the hopes that a very vulnerable, exposed banking system can be prevented from collapsing. One also sees the same tension between advocates: free market enthusiasts are concerned with enhancing efficiency and competition without stultifying regulatory costs; traditional groups are sure that self policing and informal, not legislative, organization efforts work best; whereas government interventionists hold that regulation is required to prevent abuse, crime or economic disaster.

The underground economy

Expanding illegal activities worldwide include those which are part of the underground economy (also referred to as the "unreported," "cash," "hidden," "subterranean," "irregular," or "black" economy, also in Europe as "black work" or "fiddling"). Conversely, one aspect of underground economy will be its criminal sector. Here we distinguish between activities illegally generating monies as opposed to legally earned monies whose owners become criminalized only through tax evasion efforts.

The underground economy is that sector of work and exchange—goods, credit or money—which is undocumented, not officially regulated or reported, subject to taxation but not reported, and for the most part intentionally undertaken with concealment in order to avoid regulation and taxation. This functional description makes it analogous to the Euromarket itself, except that the latter is legally sanctioned, provides for reporting (of aggregate transactions only), and includes only financial transactions. The underground economy, on the other hand, begins with labor itself and includes bartered activities and goods.

Underground economies are found in all major Western countries where, like the Euromarket, they are expanding to take a significant share of the productive sector, estimated, for example in France, up to 30 per cent of the GNP, or in Italy 40 per cent.[34] This expansion is attributable to increased taxation and inflation, providing incentives to workers and entrepreneurs to seek to retain earnings. It is also attributable to a continuing demand for goods and services which are competitively cheaper; typically the buyer pays less when paying cash off the books. For economists these factors constitute a classical explanation for the growth of an economic mode.

The underground economy, at least within the U.S., is also attributable to presumed changes in attitudes within the citizenry—attitudes which one speculatively described as alienation between citizen and government, or a reduced commitment to that sense of national community which would integrate the individual into the "honest, tax-paying citizen" role. Closely related shifts are reflected in the exaltation of selfish pursuits (e.g., recreational drug use even though illegal) and the "me society." Consequences include an expanding criminality and disintegrating traditional institutions, e.g., the family. For example, U.S. rates for violent and property crimes as well as vice (drugs) have been rising over the last decades, contributing to an initial criminal labor pool, to demand for illegal goods and services, and to citizen indifference to traditional moral values, allowing further casual recruitment to dishonest practices as one sees in business-type crimes.

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[34] F. Braudel, interview in Forbes, June 21, 1982, pp. 132-136.

Our criminological argument is that classical economics provides a necessary but not a sufficient reason to account for the growth of the underground economy. People must also have attitudes and values which justify their engaging in conduct which they know to be illegal. Such willingness to be "criminal" must also be assumed to be related to the perceived absence of risk; citizens are not deterred from fiscal crime because as reasonable estimators they see little risk to themselves from existing policing institutions, or from earning the bad opinion of their peers.[35] The IRS itself did not address the underground economy, associated tax losses, or the implied policy issues for tax gathering, until a 1979 report. That report yields an estimate for 1976 of $75 billion of unreported income from legal sources with an added estimate of $25 to $35 billion of individual criminal income. Tax losses were set at $17 billion. Richard L. Fogel (1979) of the General Accounting Office critized the report, noting that no estimates for smuggling or bootlegging were included, nor was business theft.[36] There were also other major deficiencies for the IRS relied on a closed system of analysis, primarily deriving estimates from IRS data previously gathered. Even so, in March 1980, Mortimer Caplin, former IRS Commissioner, acknowledged "stunning" evasion. The IRS estimate indicated that 40 per cent of all self-employed income, 50 per cent of rent and royalty income, 22 per cent of capital gains on property sales and 16 per cent of dividend/interest income were unreported.

The Bureau of Economic Analysis, relying on 1978 data, estimated that unreported earned income was about $100 billion. The BEA data dispute P. M. Guttman and others who calculate a more rapid rate of increase in the underground than in the reported economies, for the BEA estimated a decline in that rate of growth. BEA methods are also limited, for they rely on reported data, i.e., state employment agency figures derived from employers.[37]

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[35] It is beyond the scope of this report to examine in detail studies on the underground economy. For a recent scholarly review see Barry E. Molefsky, America's Underground Economy, Report No. 81-181E, July 28, 1981, Congressional Research Service, Library of Congress, and for a more popularized description see Business Week, April 5, 1982. For other references included these relied upon in this section for summary data, see the following: W. J. Anderson, statement before the Subcommittee on Oversight of the Internal Revenue Service of the Senate Committee on Finance on Senate Bill 2198, Taxpayer Compliance Improvement Act of 1982, Washington, D.C.: General Accounting Office, March 22, 1982; R. H. Blum, Offshore Money Flows: A Large Dark Number, Journal of International Affairs, Spring/Summer 1981, pp. 69–93; Roscoe L. Egger, Commissioner of the Internal Revenue Service, statement before the Subcommittee on Oversight of the Internal Revenue Service of the Senate Finance Committee, March 22, 1982; E. L. Feige, The Irregular Economy: Its size and Macroeconomic Implications, Social Systems Research Institute, University of Wisconsin, May 1979; P. M. Guttman, Professor Guttman Replies, Financial Analysts Journal, November/December 1978, pp. 67–69; IRS Publication 1104, 1979; F. C. Klein, Underground, Inc., The Wall Street Journal, November 30, 1978; Jerry Knight, Notes from the Underground, Washington Post, July 21, 1982; M. B. Krauss, the Social Democracies: Equality Under Strain, The Wall Street Journal, February 1, 1980; T. S. Par, Relationship Between Personal Income and Adjusted Gross Income, 1974–78, "Survey of Current Business," November 1981, pp. 24–28, 46; C. P. Simon and A. D. Witte, Executive Summary of the Underground Economy, Income Tax Evasion, and the Demand for Currency in the United States, Department Memo (DM) Series, International Monetary Fund, Washington, D.C., November 5, 1979.

[36] Testimony before Subcommittee on Commerce, Consumer and Monetary Affairs, House Committee on Governmental Operations, at hearings on the subterranean economy, September 6, 1979.

Adjusting for inflation, we have estimates of the underground economy from a low $60 billion to a high $600 billion. Roughly factoring in disputed annual rates of its growth (BEA 5 percent, Guttman 23 percent) projected on a straight-line basis one finds the 1982 estimates are a low of $70 billion contrasted to the maximum of almost $900 billion. Various sensible caveats offered by Barry E. Molefsky (1981) must be taken into account so that the upper range projection should be immediately rejected. The most recent model and midrange figure, attributed by Business Week (1982) to Simon and Witte, is $330 billion.[38]

The IRS now describes the limitations in its earlier figures and a rapid growth in the underground economy (Egger, 1982). A tax loss for 1981 of $95 billion is estimated which implies an underground economy of $450 billion. (Clark 1982) This represents a five-fold increase over the IRS 1979 estimates. Non-farm business income accounts for the largest estimated tax evasion, 31 percent, with capital gain, dividend and interest evasion second. The source of these losses is in keeping with earlier observations on the growth of business fraud. Indeed, Anderson (1982), in Congressional testimony, notes that compliance reduction over a 10-year period was greatest for small businessmen, who paid only 43 percent of taxes due. Small corporation compliance has also been dropping.

All involved in estimating the elements of the underground economy agree that criminally generated funds are a minor portion. For the IRS in 1979, that fraction was 25 percent. The 1982 Egger testimony—offered with the qualification that much of the criminal sector was excluded from estimation—attributes only 8 percent of the loss to the illegal sector. Simon and Witte's (Business Week 1982) estimate, using a broader description of criminal activities than the IRS, includes drugs, bribery, arson, prostitution, pornography, gambling and loan sharking, fraud and other activities. They propose that about one-third of the underground economy ($110 billion) is illegally generated.

Former IRS Commissioner Kurtz and Brookings Institute economic director Perchman have expressed the opinion (New York Times, July 12, 1982) that current IRS revenue loss estimates are substantially exaggerated.[39] Extrapolating from their estimates based on Bureau of Economic Analysis calculations for 1978 of a total underground economy of about $108 billion, one would conclude that the loss from unpaid taxes for 1982 would not be more than $33 billion. Kurtz and Perchman do not estimate the criminal fraction herein. Were they to accept the current IRS 8 percent estimate of revenue loss attributable to untaxed crime, and if one extrapolates an effective tax due rate of 20 percent, as they do for legitimate unreported income, then one would conclude that taxes lost from unreported crime income are not more than $3 billion, and that criminal income in the U.S. does not annually exceed $15 billion.

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[37] In contrast to the IRS and BEA estimates, and an even lower estimate by V. Tanzi (1979) of between $60 and $73 billion, P. M. Guttman proposed for 1978 an underground economy producing $200 billion or 10 percent of the gross national product. E. L. Fiege offered an even larger figure, $540 billion or over one-quarter of the GNP. C. P. Simon and A. D. Witte offered for 1974 an estimate of between $90 billion and $102 billion.

[38] Some suspect consistent underrepresentation of underground estimates of profit concealment by legitimate corporations, especially those heavily engaged in international trade. Opportunities do exist, and, according to businessmen interviewed, are commonly exploited.

[39] The IRS argument *for* the existence of a large underground economy is not simply responsible to criticism, but can be used to argue for expanded IRS powers and personnel to gather in these presumably lost but partially obtainable revenues.

It is expected that the legally and illegally based sectors of the underground economy will continue to expand, as will the associated loss in tax revenues. Expanding too are "black" disposable income and currency circulation. Since the IRS's own limited demonstration that among reporting taxpayers about half will be detectable as having cheated when given the opportunity, one must assume that the best prediction is that the taxpayer with an opportunity to cheat will do so, be that an individual or a business. Because self employment and small business are growing more rapidly than other employment sectors, the opportunity for tax evasion on the part of people in increasing. Further, since crime is growing, and since in particular business-type crime appears to be growing, opportunities for these criminal earnings and sophisticated placement of those earnings are also on the increase.

These trends raise fears that:

(a) The majority of Americans no longer abide by a strict standard of voluntary taxation; they will do what they can when they can to escape taxes.

(b) An increasing number, albeit a minority, of Americans will derive income criminally. These will include "respectable" business, professional and working people, as well as "street" and professional criminals. They wish to escape detection, prosecution and taxation, and, in doing so, may be looking for futher criminal opportunities as well.

(c) An increasing number of Americans, perhaps now nearing a majority, are witting consumers of criminal goods and services. As the youthful base of marijuana and cocaine users becomes adult regular drug users, as city customers for regular vendors and suburban flea market bargain hunters constitute a market for stolen, fenced goods, as utilization of outlawed prostitution and gambling services continues, then there grows a constituency for crime. Furthermore, insofar as providers of legitimate services benefit from the trade of offenders, that constituency is expanded. Neither large and otherwise "honest" group will intervene against its own criminally served interests. A giant social network which provides approval, income and supporting services to selected business-type offenders functions strongly.

Control: Regulation versus supervision

Risks experienced and perceived generate calls for control, either enacted as statutory measures by nations internationally coordinated, or simply control imposed as administrative, institutional practice as part of ongoing supervision.

Responding to calls for imposed regulation, the Bank for International Settlements[40] (1980) has concluded that improved supervision is the better option. Specifically, BIS opposes reserve requirement impositions. One can see that legislative control over the offshore system depends entirely on national legislation. Laws are enacted (if and when) by heterogeneous legislators whose differing political views, value systems, priorities, constituent economic interests and personal competencies define offshore banking controls. Thus delays must be foreseen in efforts to create any regulatroy system worldwide. And, as one seeks a worldwide system, should any nation now or seeking to be a haven elect not to impose controls, or intentionally provide for controls less stringent than competitor nations, the result would be that banks would move to the new free zones. The uncontrolled jurisdiction would benefit to the cost of its former competitors. The Eurobanking system history would be repeated, although at great initial cost to existing mechanisms and institutions because of disruptions and displacement.

As long as incentives remain for relocation to avoid regulations, it is predictable that some jurisdictions will offer those incentives, and all those currently enjoying the advantages of the Euromarket would move to these jurisdictions unless legislatively constrained, for example by a new round of currency controls. Insofar as these jurisdictions are likely to be those now most careless of regulation, or indeed corrupt, a movement out of presently regulated jurisdiction to these greener pastures would also entail a significant increase in prudent risks and criminality.

There would also be financial costs, not simply in reduced efficiency within a disrupted, higher-risk, relocated Euromarket, but because enacting nations would seek to enforce restraints. Enforcement itself incurs direct and indirect costs, and with demand present (however elastic), is inefficient. Disobedience under control would take place. Insofar as a national response to disobedience of law is to tend to move from civil to criminal sanctions, then a further cost is to criminalize nonconformity. Ultimately the law may overreach, imposing both expectations and costs that are an unpreferred solution.

For the foregoing reasons, one can understand the BIS position in favor of improved supervision through international coordination, using the administrative apparatus of national and headquarter banks and monetary authorities working in a coordinated fashion. The BIS position is consonant with earlier agreements and can be seen as an expansion of the 1974 Concordat[41] among the Group of Ten plus Switzerland. The Concordat itself was a statement of responsibilities and basic procedures pertaining thereto, for parent banks in relationship to overseas branches and subsidiaries, and for central banks with respect to the supervision of general banking.[42]

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[40] The BIS may not be entirely objective, i.e., since it plays a role and is a part of the prevailing bankers' community. It is not simply the central bank for central banks, but is an nonreporting, closely held, Swiss haven for such funds as central banks wish to place within its confidential vaults.

[41] W. P. Cooke, The Development of Cooperation Between Bank Supervisory Authorities in the Group of Ten Countries, Luxembourg and Switzerland, International Conference on Banking Supervisors, Proceedings, 1981, pp. 51–58; H. J. Muller, The Concordat: A Model For International Cooperation, Introduction, the introduction to paper given at the International Conference of Banking Supervisors, London, July 5–6, 1979.

There is a current effort in BIS under a group—the "Cooke Committee"—to persuade banking authorities worldwide to agree to an expanded Concordat with respect to parent bank supervision of offshore activities, and with respect to monetary authority officials. Self-policing anywhere is necessarily a process of consensus achievement through internal and private debate in a closely-held group absent public scrutiny, and absent group costs either for failures to police or for deviations from the consensus-based norms. The problems with self-policing everywhere are that it is comfortable, that change is slow if not languid, that there are no compulsory mechanisms, and that there is no opportunity to define a public interest via public discussion.

When set to an international task, the self-policing efforts get buried in national issues of perceived self-interest and existing legislation. One asks if, as bankers often argue, there is more cohesiveness among an international community of bankers acting informally but persuasively under BIS auspices, then there is a chance for near uniform and universal multilaterally induced national legislation.

The answer to the question is in favor of the BIS-sponsored self-policing effort. That conclusion does not imply that legislative controls, internationally conceived, cannot ever be applied. But our conclusion does suggest that cooperative measures for internationally coordinated, consensus based supervision can be developed and exercised administratively within the framework of existing legitimate institutions. Such a step represents an expansion of the responsibilities of central banks; it will, we believe, almost inevitably lead to the recognition by central banks of the need for assistance from other quarters as they begin to wrestle with issues of jurisdictional self-interest in relationship to bank buccaneering.

The supervisoral emphasis is compatible with the broad perspective of some economists. We quote from World Financial Markets (March 1979, p. 12):

> Many of the problems attributed to the Euro-currency market are really a manifestation of more fundamental problems in the world economy. Much of the concern expressed about the market should be directed at the underlying causes of capital flows rather than at the particular channel through which they occur. Even in areas where there are some legitimate reasons for concern, comprehensive regulation of the Euro market is a very poor remedy. . . . Indeed, calls for regulation are often confused with demands for more information. . . . Moreover, regulation is not a substitute for sound bank management.

On the other hand, this argument tends to recommend acceptance either of the status quo or the easiest of any possible remedies simply because "causes" *are* believed to be elsewhere. Often that

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[42] What may be agreed to as a central bank responsibility, and what occurs in practice are found to differ. The Italian Central Bank's failure to take protective action following Banco Ambrosiano's Luxembourg (and other havens) losses tends to erode confidence in the Concordat itself.

"elsewhere" is even more difficult to examine and control. Nor should one be misled by cost/benefit calculations, because any appeal to economic equations requires data which does not exist.

The Subcommittee's consultant strongly recommends immediate expansion of supervision of the Bank of International Supplements (BIS). This would no doubt be compatible with present FRB policy. As a long term remedy he proposes the construction of "an international regulatory fabric, woven of treaties and agreements and exercised by a specialized international body (whether part of BIS or otherwise, but most certainly not the United Nations)." The inherent appeal of such an approach is obvious. Unfortunately no existing international body has yet come forward to assume this role.

Summary of reasons for offshore financial activities

The foregoing sections make it clear that the offshore financial market has many advantages for rational economic operations. The Euromarket efficiently serves national governments, semi-public agencies, private corporations and individuals. The reasonable expectation, when one learns that an entity is engaged offshore, is that it is there for honest economic reasons, buttressed by whatever advantages privacy holds. The major categories for offshore use are: to profit from higher interest rates when lending, to enjoy lower interest rates when borrowing, to escape taxation, to enjoy greater business flexibility by avoiding regulation in an efficient market, to enjoy the protections of confidentiality when engaged in activities, which if known to others in advance might hazard business success or profit margins, and, through the confidentiality mechanisms, to hedge and enjoy other risk-allaying methods through offshore diversification, liquidity, forward speculations and the like.

In some cases, as we have seen in reviewing criminal aspects, secrecy is the *sina qua non* for activities for which the refined economic advantages, e.g., interest rate differentials, of the offshore location are equal or secondary considerations. That occurs whenever monies are hidden (laundered) because any enjoyment of proceeds onshore would be forbidden, i.e., subject to prosecution. Secrecy is also necessary for violations of currency controls. It is paramount in financing operations which do not have an economic motive, as for example providing secure centers from which to finance politically-motivated activities ranging from propaganda, arms traffic and espionage to terrorism and assassination.

There is also family banking where relatives, or closely linked groups of friends, buy banks to enhance their autonomy and flexibility, i.e., a business use within a familial-social context. And conversely, one finds citizens using offshore deposits as a way of disinheriting or frustrating spouses without detection or risk of attachment.

Nor can one rule out that aspect of offshore banking which, while capable of being associated with confidence games, is primarily psychological. There is excitement for some people just in having a secret account, or in amassing and retaining secret monies.

Offshores: Do they profit a jurisdiction?

This question also constitutes a debate among scholars, although it is one unrelated to controls. Almost all who speak of the Eurobanking system do so with the assumption of profitability not simply to banks and users thereof, but to host locales. For financial centers there is no argument: London banking employs many, and so does banking in New York or Hong Kong.

In a 1979 IMF department study Ian McCarthy was the first to challenge the notion that offshore facilities are also of great benefit to the smaller domains, an assumption which has powered the race of jurisdictions as small as Anguilla or Montserrat to get into the offshore banking business. McCarthy points out that Eurodollars themselves never see such locales, for when "booked" offshore, the monies never leave the major financial centers. When banks are in fact shells, or brass plates, there is little employment opportunity. One lawyer-agent can "operate" 20 banks. Since tax havens do not tax, the only revenue gain is from licensing. Hence, gains calculated as a portion of the national budget can be small indeed.

In 1981, R. Ramsaran, (University of the West Indies) examined the Bahamas as a case in point. Of 300 banks licensed in 1979, 270 were brass plates with no physical presence, being "passive" and "paper" institutions. One per cent of total tax revenue in the Bahamas is garnered from their licensing and annual fees, and total bank employees account for 2 or 3 per cent of the Nassau work force. Ramsaran estimates banking contributed about 10 per cent of the total reported 1979 gross national product. However, banks engaged exclusively in offshore operations are of no consequence as loan originators to local government or commerce; in the Bahamas, for example, government borrowing is largely supported by those international banks which operate locally as well as internationally, i.e., Class A banks. Among these Class A banks there can be wide differences with respect to willingness to engage in local lending. These lending functions can be—are, when exercised—advantageous, but according to Ramsaran, loans are primarily to the public rather than the private sector. The absence of adequate central banking in turn poses a risk of offsetting and unreported costs, fraud, and corruption. Insofar as intimate ties develop between fraudulent operators and an elite, the leadership as a model for integrity is lost, with the consequence that "the very character of the people becomes associated with fraud and dishonesty."

A large and reputable offshore bank, or banks, offers an efficient domestic banking system, sometimes through a branch network, useful to the local population. Services and funds thereby available to the local population can be greater than would be available where resources to be limited to strictly domestic banks, i.e., amounts available for local lending, are greater. Through such larger banks—and in havens large banks are the international branches—local citizens and institutions can place their loans safely (depending on supervisorial adequacy) and with potentially greater diversity of lending possible.

It appears that, while McCarthy and Ramsaran are correct with respect to the proportionately minor budgetary contribution of offshore banking to haven jurisdictions, one must not overlook the importance of any contribution to faltering economies, nor such prestige as may be sought through banking. In Montserrat, bank licensing fees have replaced prior British general subsidies, and by themselves make the difference between a balanced and unbalanced budget. Put differently, the fees allow incrementally greater expenditures on the public sector in a small nation with little income. In the Bahamas, while 10 per cent of the GNP—or, as estimated for 1982, 15 per cent—plays a second fiddle to the 70 per cent major source, tourism, nevertheless the bank-related income of over $70 million is welcome. (Not counted, but also a major income source, is narcotics traffic.) Furthermore, the white-collar jobs which banking provides are considered very desirable and thus take on extra and prideful visibility in the employment sector.

To this point we would concur with McCarthy and Ramsaran that, in seeking to attract offshore banking, local authorities in less developed regions may exaggerate anticipated benefits. Further, authorities may fail to calculate the negative effects on national reputation and local integrity which indiscriminate licensing of banks and companies, by encouraging fruadulent operators and local corrupt practices, may encourage. They may also learn about accompanying risk only after disruptive insolvencies, as has been the case in many havens.

There is, then, no simple answer to the intricate question of the value of offshore banking to haven jurisdictions. At the very least one must specify benefits and cost—to whom, what kind—take note of trends over time, and be sensitive to the general rule outlined here to the effect that each offshore jurisdiction and financial center must be examined on a case-by-case basis. Equally important, one must recognize that the sanguine expectations or evaluations on the part of local authorities may fail to consider the complexity of the issues involved, especially long-term risks.

The expanding offshore criminal market: Fraud and its friendly environment

All of the earlier discussed facilitating conditions and advantages apply when describing incentives for the criminal use of offshore facilities. In addition, any local condition conducive to economic crime (crimes for gain), in a circumstance which allows for the transfer of assets offshore, and where, as in modern nations, there is a disincentive for holding assets openly, will increase the criminal use of the offshore sanctuaries. Violent crimes which require financing (terrorism), or result in gain (kidnapping), will also be found to do offshore financing when they are themselves international in nature. Of course, international financial transactions may occur in support of crime without being "offshore."

The Council of Europe received a report (1980) which concluded that in Europe there has been an impressive increase in violent crimes. These crimes are supported by large financial resources where money laundering through normal banking operations is typically a part of the criminal enterprise. The Council of Europe observed that "prevention and control to combat this behavior cannot succeed if confined in a single national context. Therefore international collaboration is needed."

An earlier report to the Council of Europe described the growth in criminality in business-type crime. The report observed that there has been post World War II expansion in the number of individuals in the industrial world engaging in full-time professional economic crime, that is, crimes which are organized as businesses, within businesses, or with many aspects which are businesslike. The range of these is great, from the familiar forms of the North America "mafia" of other groups engaged in vice, loan sharking, gambling and the like, to the operations of major legitimate industries some of whose activities are directly criminal. In between are organizations from drug traffickers, arms smugglers, terrorists, art fraud and auto theft rings, to loosely-knit associations of investment swindlers, bank fraud operators, commodities speculation artists and the like. These organizations, like other businesses, enjoy the advantages of being international. Such advantages range from simple to complex: quick flight to a non-extraditing nation, the ease of identity shifts through passport exchange, the remarkable capacity to work through shell companies diversely located in offshore as "cut outs," the capacity to utilize normal company transactions to shift funds and to conceal funds transfers via false vouchers, phony loans and the like.[43]

Internationalized crime benefits from the lack of uniformity in law, nation to nation, the limited jurisdictions of the police, as yet primitive international police cooperation—let alone any internationalization of police in parallel to industry, banking or crime—and the sheer size of international business transactions which hazard auditing surveillance of international money transfer. Consider that the commercial interpayment system run by the Clearing House Interbank Payment Systems (CHIPS), representing primarily although not exclusively international transactions, averages about $220 billion per day in gross settlements for both monetary and fiscal transactions (i.e., cash effect on currency exchanges as well as settlements). For example, on June 16, 1982, CHIPS settlements were $236.8 billion, on June 15, $218 billion, on June 14, $248.6 billion. The users of the CHIPS system are banks and other agencies, their customers are banks and corporations. No personal transactions are handled through the CHIPS system where the average individual transaction is $2 million.

As the distinction between the criminal and non-criminal business person, or business practice, blurs (this as businessmen are recruited to crime and criminals to business), both legislation defining crime, and investigations of it in this complicated, professional and concealed form, lag. Furthermore, innovation in technology and commerce in rapid, followed by predatory activities exploiting developments with the result that not only is the diversity and complexity of fraud itself increased, but the law simply does not keep up with predatory events. Thus much business takes place in violation of trust, which is not yet in violation of law.

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[43] See Jonathan Kwitney, "The Foundation Pen Conspiracy," New York: Alfred A Knopf, 1979.

Internationalized crime also benefits from the anomymity which companies and individuals enjoy when away from home,[44] as well as from the fact that commerce, like daily life, rests primarily on trust, including trust in banks, lawyers and corporate representations.

At the same time that these criminogenic conditions are expanded, the ability of law enforcement to respond may actually deteriorate. Difficulties arise in the exchange of official information capable of being used as evidence; procedural protections in law grow in step with civil liberty concerns; police are slow to increase their competence with respect to business-type crimes; and international police matters, such as extradition, letters rogatory, and information requests on confidential bank or corporate matters, tend to become mired in formal diplomatic channels rather than being expedited by direct police-to-police exchange.

Finally, when examining police investigations which focus on international crime, it is apparent that traditional views, as well as the foregoing constraining conditions, limit the activities of many police forces, including our own. Many national police agencies find themselves understaffed with respect to investigators capable of examining international business-type crime. It is this situation which prompted the Cayman Islands to set up a special unit in 1981 and the U.S. Drug Enforcement Administration has been trying to increase its ability to investigage "paper" cases for the last several years.

Thus, not only is international business crime expanding and protected by the absence of equivalent counterforces, but police themselves are likely to focus on fraud, drug trafficking,[45] etc., with considerably less emphasis on the fiscal aspects of crime per se, i.e., laundering. As for tax evasion police in most countries play a minor role.

Enter opportunity: The offshore havens

There are funds, both cash and business accounts, looking for a place to hide for safe and profitable investment, for liquidity, and for transformation to apparent legitimacy. Present are millions of people with increasing skills at concealed financial affairs, including the use of business facilities and techniques. Included are corporations already engaged in foreign trade. Present is a specialized infrastructure of professionals, financial institutions, transportation agents, funds, motives and mechanisms.

Enter now specific incentives. Any individual, corporate cabal, or criminal organization whose profits are criminally derived, or are lawfully earned but not reported for taxation will, if alert to the risks of detection and conviction because of having left a "paper trail," want to block that trail. A "paper trail" exists whenever there are documented funds or other asset transactions through institutions (checks, deposits, wire transfer orders, receipts, purchase or loan papers, stock or other ownership records, etc.) which are accessible to tax or law enforcement investigators on subpoena, through the inspection of public records, or on audit of private records. Within the U.S. such documents serve to identify offenders and as evidence in court to convict of crime. Abroad, nations without secrecy laws governing banking or company transactions, or with such laws but breachable upon evidence that a crime has been committed will make such documents available to U.S. investigators (procedures for obtaining information/documents differ depending on the nature of treaties or cooperative practices). Only in haven juridictions where secrecy is practiced and information exchange agreements do not obtain can one be fairly sure the paper trail is blocked.

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[44] See J. A. Mack, "The Crime Industry, Lexington, Mass.:" Lexington Books, D.C. Heath & Co., 1975. Mack cites data to the effect that the highest crime rates in the Netherlands are found in border regions and tourist centers.

[45] Interpol, like many police forces, has been led to an increased focus on the problem of international movement and sequestering of criminal funds because of the expanding sale of drugs in the Western world. In February 1982 Interpol devoted a seminar to financial assets in relationship to drug trafficking. Interpol has now prepared a financial assets guide which surveys 58 Interpol member countries with reference to transfer and importation/exportation of monetary instruments. Also described are policies on seizures of assets. Interpol is said to be active in providing confidential warning respecting frauds being perpetrated by shell banks. All of these are welcome developments which merit endorsement and assistance.

Individuals or companies who are concerned about the seizure, forfeiture, or other attachment of assets—be these poisoned fruits of criminal enterprise, funds hiding from or protesting the tax collector, or assets threatened by judicial award to present or potential claimants (civil suit, damage awards, alimony, restitution requirements, governmental blocking of assets, etc.)—will want to place their monies out of reach.

Abroad, people who fear disruptive political change, persecution, war, currency controls or stifling commerical regulation, or who wish to escape the reach of Napoleonic codes decreeing fixed portions of estates to blood kin as heirs will also want their monies safely and secretly out of reach. In addition, persons or corporate groups who conceive of retirement abroad, or lavish living, or advantageous investment overseas using tax-escaping monies—or people who wish to use their monies in ways prohibited by U.S. law for overseas transactions (bribes, guerrilla support, arms purchases)—can also decide to sequester and employ monies overseas.

Opportunity beckons: the haven banking system conveniently located for Americans in the Caymans and the Bahamas a short suitcase journey from Miami, and much easier, any local bank through which funds can be transferred by wire abroad once one has established company accounts for transit ease.

V. COUNTRY SKETCHES

As part of research earlier for the Department of Justice and the Ford Foundation, and in 1982 for the Permanent Subcommittee on Investigation, the Subcommittee's consultant made visits to offshore financial centers and havens.

Interviews were held with banking, business and law professionals, with members of government banking and finance regulatory bodies, law enforcement administrators, participating offenders, and—on PSI visits—with U.S. State Department personnel. At no time was it possible to conduct in-depth work. For example, two visits to Montserrat totaled no more than five days, the Bahamas, six days, Switzerland, 15 days, etc. Visited on one or another occasion were Antigua, Bahamas, Bermuda, EEC headquarters (Brussels), London, Montserrat, Panama, St. Kitts. However intensive interviews were during these visits, conclusions are necessarily somewhat impressionistic. Nevertheless, the following summary sketches are based on these visits as supplemented by other sources. The object is to identify specific issues, procedures involved as well as the social and political context against which any policy proposals must be considered.

Antigua

Antigua has recently become independent, although still within the British Commonwealth. A small island nation, heavily dependent on tourism, it lacks resources and is in debt. Given a precarious situation economically,[46] revenues of any kind are consequential; thus bank licensing fees are important as are Antigua's hopes to make itself into a more thriving Eurobank center. Toward this end a special committee supported by the European Development Fund (EDF) had drafted recommendations for legislation which will alter the present Antiguan bank and registered company structure. Barbados and Cayman law, including the Cayman secrecy provisions, are described as the model.

Under existing law and practice, Antigua has suffered from bank insolvencies and associated offshore criminality. Whether the adoption of a new law will bring remedy is the critical question, for in Antigua there are elemental problems which pose hazards: the desperate need for income, the near total lack of trained personnel to govern and to administer and implement law, the fact that informal practices independent of and perhaps contrary to law exist, the absence of enforced ethical codes among attorneys,[47] and the *de facto* absence of any system of records or institutional memory.

Officials of Antigua state that Antigua is eager to improve relations with the United States and its neighbors, as it searches for solutions to the problems of self-sufficiency that it has just begun to assess. At the same time it is imperiled by lack of experience, direction and confidence.

Antiguan banks and registered companies

Banks are registered companies authorized to include the term "bank" in their title. The differentiation between a domestic commercial bank and an offshore one occurs only as a function of an endorsement on a banking license. There are no registration requirements for a company other than payment of fees, no assets must be on deposit, and no vetting or screening is done of applicants. At one time in the past, existing commercial banks were asked to assist in vetting; however, it became apparent to the government that these seven operating, licensed banks, fearing competition, were excluding all applicants. The present system, on the other hand, requires only that registration papers and a fee be presented to authorities by an attorney, and within a few days the new company, calling itself "bank," "trust," or otherwise, is in existence.[48]

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[46] The Caribbean generally suffers economic depression. The 12 nation Caricon (Caribbean Community) overall national product growth has dropped from a 6 per cent annual rate in the 1960s to less than 1 per cent now (Wall Street Journal, November 19, 1982). Even so, the Antiguan Deputy Prime Minister has recently claimed a $6.7 per cent real growth (Barbados, Advocate News, May 27, 1982). One must be exceedingly cautious in accepting that figure.

[47] In theory Antiguan attorneys are bound by the same ethical precepts that apply to U.K. attorneys. In practice only a few attorneys are said to be ethical. Those outstanding ones are governed by their own self-discipline, not by an actual Bar ethical enforcement. There is a provision in the West Indies Associates Supreme Court Act (1968) for a disciplinary body, composed of the High Court judges, but it is not active in Antigua.

Government authorities have no adequate records of the number of registered companies which exist, although a regulation requires annual reporting by companies. The regulation states that the reporting failure will result in removal of the company name from the Register. It is presumed that the Register exists, but in a very incomplete form. The Inland Revenue Department is attempting to keep a record of newly registered companies. We are told companies number in the hundreds or thousands. Most companies approved as banks have no visible activities on the island. What their activities offshore may be is unknown. Nor does the government keep records as to the number of registered companies which operate offshore as banks; one official undertook on his own to compile such a list, arriving at a minimum of 33. He states he has no way of knowing whether the figure is accurate. In many instances authorities learn of a registered company *qua* bank only when a police inquiry or criminal complaint from abroad is received. In four recent cases, after notification by U.S. authorities of criminal prosecution for fraud, four "bank" company licenses have been revoked. No company owner or banker has been charged with any offense locally, with the one perception of a foreign "wheeler dealer" passing bad checks on the island. Although regulations prohibit a company referring to itself as a bank without approval, some companies operating offshore may nevertheless employ the prohibited terminology.

Just as there is no vetting procedure or standard for offshore use of a bank name, there is no banking supervision for licensed banks. Ministers state that Antigua would welcome major U.S. banks on the island for the example that their headquarters control and supervision by the Federal Reserve and Comptroller of the Currency would present. In the meantime, authorities fear the insolvency of one operating bank in whose affairs some argue they cannot intervene for lack of statutory authority, whereas others admit they fear to intervene lest the reality of depositor loss be a political problem. Thus the bank continues to operate, either improving its position or digging itself ever deeper into the insolvency abyss.

No Antiguan authority was aware of any dispute with the U.S. on any matter of law or policy. With respect to information on beneficial ownership or banks, secrecy law derives primarily from common law precedent, although provisions for confidentiality may also be found in the Banking Act and the Bankers Books Evidence Act.

"The FBI is in and out of here all the time," and "Antigua would under no circumstances wish to create a stituation in opposition to legitimate interests regarding access to offshore information." These are statements frequently heard. To date no one cites a case in which cooperation with U.S. enforcement authorities on such matters was refused. The problem is that the government itself has no idea who beneficial owners of registered companies—including offshore bank or trust companies—may be, for there are no such records. Attorneys who establish companies may know who has forwarded fees to them, but even without regard to the matter of privilege, there is no reason to believe that an attorney knows at whose behest he has acted. A further complication is the genuine concern that, were information made available about offshore owners influential with senior officials, informal steps might be taken to block information flow. An illustration offered was the 1982 refusal to extradite Robert Vesco during his business trip to the island, on which occasion he consulted with the head of state.

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[48] This description is the status through 1982. We have not seen the recommended new legislation prepared by the European Development Fund. Antiguan authorities said they would provide the Subcommittee with a draft.

It is likely, in any event, that the current lack of restriction on response to U.S. or other information requests will shortly be altered, the new banking law will be most like that of the Cayman Islands, including criminal sanctions applied to violations of confidentiality.

There is almost complete agreement among officials and bankers on the island—one large commercial bank an exception—that Antigua is in desperate need of a central banking authority. The authority most favored is that which was proposed formally to a number of East Caribbean legislatures five years ago and envisioned by the British as part of the independence process; that is, the monetary authority ECCA (East Caribbean Currency Authority) would become a central bank, as did the monetary authority in Jamaica. Toward that end, the International Monetary Fund drew up a model central bank authority, one which would supervise licensing, establish banking standards (reserve requirements, audit standards, etc.), conduct audits, maintain liaison with other national banking authorities, issues currency, assist governments in budgetary and financial matters, etc.

It is further generally agreed that, however desperate Antigua is for funds, there is no point, with respect to banks and registered companies, in simply granting loans with the hope that local authorities can do the job. They cannot. One must recognize that the plans for an offshore banking industry must be articulated with other development plans and that, in all these matters, expert help is required.

The Caribbean Basin Initiative is welcomed, as is any expression of interest in or support of Antigua. It contradicts such expressed fears as, "The U.S. may not notice us because we are too small." Nevertheless, the CBI is not seen as a panacea, for, at most, Antigua expects to receive $1 million, merely a fraction of its growing and uncontrolled debt. The "strings" on the CBI with respect to transfer of information are, under present law and given present eagerness to cooperate with the U.S., of no concern. It is unlikely that any official on Antigua wishes to create a policy contravening legitimate anti-criminal action, nor to offend the U.S. upon whom its future is seen depending.

But this is a critical period.[49] Antigua's legislature is considering adoption of the offshore banking legislation recommended to it by its blue ribbon European Development Fund committee. In the interim there are ongoing negotiations, such as the Bilateral Investment Treaty for approved investment tax credits for U.S. firms locating there. There is the CBI, still blocked in Congress. There is the need for ECCA transformation but no evidence of U.S. support for that. There is the convention tax allowance granted Jamaica but not Antigua. Antiguans even wish for a military assistance treaty but none is proposed although the U.S. does maintain a base on the island. And within the small U.S. Embassy staff itself, Antiguan authorities observe that no political-economic officer has filled the empty post for many months. Finally, among many Antiguans there is also strong criticism of uncoordinated forays and inconsistent signals by U.S. law enforcement agency personnel when seeking Antiguan assistance in criminal matters.

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[49] We are advised but have not confirmed that Antigua has abrogated its participation in the U.S.-U.K. (and dependencies) mutual taxation treaty.

Anigua needs assistance. It is impoverished, plagued with influence peddlers and foreign freebooters, with a local bar ungoverned by an ethical code and some local officials who are allegedly careless about favors or the foreign company they keep. Absent that assistance (as a senior minister suggests) it does have a choice about whether to be more or less difficult with respect to U.S. criminal and tax matters affecting offshore banking and registered companies. It can, in fact, follow the "advice" of unnamed sources that it seek to compete for U.S. secret business with the Caymans rather than cooperate with the U.S. Its officials seem overly optimistic about the potential contribution of offshore banking Cayman style to their economy. If the Cayman practice becomes the model, then Antigua may well increase its own problems by way of reputation and local corruption, and increase those of the U.S. as well.

Such an outcome is entirely unnecessary. The staff suspects that with a reasonable U.S. commitment for assistance in developing banking and company law,[50] and in providing qualified personnel, Antiguans will be as cooperative as their positive intent, good will, and current capabilities allow them.

The Caribbean Basin Initiative can perhaps be the vehicle for such long-term prudent banking developmental assistance. That assistance might well be in collaboration with regional and international authorities and IMF, Export-Import bank and EDF with respect to bank branch practices in the cooperation with the U.K., Canada and Switzerland national bank authorities.

The following suggestions are proposed:

Antigua cannot be expected to forego licensing banks and companies offshore unless it develops other income sources. Its reliance on new, tighter banking legislation from the European Development Fund Committee is likely to include the imposition of now essentially absent secrecy requirements. No new law can do anytning about the actual lack of resources or ethical commitment in Antigua which make proper vetting, administrating and policing impossible. Development assistance is important. Fortunately, there is some reason to believe that the Antiguan government would welcome such assistance offered constructively and with respect for Antiguan economic interests and sovereignty.

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[50] Competent Antiguan authorities said they would be pleased if their PSI visitors and interested U.S. agencies would comment on, and make recommendations about, the EDF draft legislation when it is put forth.

In return for assistance, there appears to be no objection to requirements for diligence to exclude criminally tainted funds, nor for regulations which would revoke licenses for offshore entities found to be engaged in criminal activities. diligence requires access to an international information network. Were assistance to be forthcoming, there is also reason to believe Antigua would accept regional central banking, i.e., the necessary conversion of ECCA to a central bank.

Based on this study, the staff anticipates little difficulty in negotiating for exchange of information, using the U.S.-Swiss Mutual Assistance Treaty as a model, even if a Cayman-style secrecy regulation is adopted. Such assumption of a continued cooperative stance rest on the assumption that Antiguan needs are recognized, as through the Caribbean Basin Initiative or other aid programs, perhaps in coordination with the European Development Fund. A further incentive is in the convention attendance tax deduction allowability, now pertaining to Jamaica, and to successful negotiations on industrial investment tax credit.

There is no reason to believe the Antiguan legal establishment is particularly ethically reliable. Hence, recommendations for Bar improvement previously set out are applicable.

The Bahamas

The Bahamas are an island nation whose nearest territory lies only 50 miles offshore from the United States. They experience some of the most rapid population growth in the Caribbean, are estimated to have a 27 percent unemployment rate, and are graduating young people whose high aspiration, based on American standards of living, cannot be met under the current economic circumstances. Lack of natural resources or a viable agriculture industry, and a work force often characterized by Bahamians as unreliable, unmotivated, and with high wage standards, make diversification, including attraction for industry, difficult. There is no local market economy. Six of every seven dollars are spent mostly on U.S. imports. There is no income taxation except on property. Tourism, the major industry, contributes about 70 percent to the GNP and tourists pay most of the special taxes assessed.

Almost all observers and residents consider the socio-economic situation in the Bahamas volatile. It is said that the Bahamas are a "time bomb" and, if remedial measures are not found, may, within 10 years, constitute a radical-left nation hostile to the U.S. It seems generally agreed that the present well entrenched government is endeavoring to provide for economic growth and social stability within a democratic framework, but economic problems are serious.

In addition, there are acute problems which create a sense of anxiety and social instability. Income is maldistributed, with high per capita earnings in the capital area (Nassau), but much of the outlying lands impoverished. There is large underground economy which is criminally based, primarily on narcotics destined for the U.S. using the Bahamas as a way station. Local drug use is said to be on the increase. There is a dramtic rise in violent crime; piracy has made yachtsmen cautious about visits; street crime threatens many Nassau residents. These events in turn create an image which tends to reduce tourism, already hurt by the U.S. and European recession.

It is within this troubled context that the role of Eurobanking must be considered. The Bahamas are a major Eurobanking center, with Eurodollar assets of more than $100 billion, serving as an important locus for booked and actual interbank transactions, most of which are processed by the offices of the 189 U.S. bank branches in Nassau. These constitute a majority of the total of 330 banks and trusts licensed. However, few among these have a physical presence on the island. Of those present, many are shells with only two or three employees.

Reliably estimated, there is $2 to $5 billion in trust business administered in Nassau, 95 percent of which involves accounts of foreigners. The majority of these are said to be European clients who seek not only the ordinary incentives for haven banking, but a sense of safety for investments held away from Europe. Their trust branch, or their Nassau attorney in liaison with their individual trust account officer will serve as an international officer or, more cynically, as their mail drop. Some clients are said to have no business address worldwide other than their haven bank, and that of course can be under a registered company name or via a nominee attorney. The Bahamas are indeed a sanctuary for those who would not wish to be bothered by callers "at home."

We have earlier described the dominant role of the U.S. government and economy in creating conditions for the Euromarket itself. Once created, that market has its own impetus, and is certainly as important for U.S. banking as it is for the Bahamas itself. The Bahamian measure of banking importance is, however, primarily the local job market it creates. From 1,200 to 2,000 Bahamians are employed in the financial industry, with about half in Eurobanking activities and half in trust banking activities. Salaries are high and white collar jobs are prestigious. These represent for many Bahamians the ideal employment.

The banking sector is estimated by most to account for 13 to 15 percent of the GNP. This, of course, if accurate, is a substantial contribution. There is disagreement, however, as to the figure. In April of 1982, the Minister of Finance suggested that the banking sector contribution was less than this. Given the fact that Bahamian economic statistics are simply not reliable, it can only be said that more accurate accounting would also take in the underground economy, which here is entirely criminal since there are not taxes to avoid.

The Finance Ministry has a more modest appraisal of the importance of banking. In Nassau, the banking community itself is in disagreement. It contends that its contribution is indeed substantial, citing not simply employment but also training, the introduction of high technology computers and communication, etc. (Actual expenditure figures were not available to us.)

One reason that the offshore industry is not unanimously praised for its presence is that government officials and some bankers see it as providing relatively little local credit. Of course, this is the nature of offshore banking anywhere. While there are continuing local demands for credit, bankers claim there is little that is creditworthy. Other bankers, again reflecting conflict, claim that local lending is an important, indeed irreplaceable, resource provided by the international banks. Recently there has been an exceptional loan of $150 million to the government for hotel-convention center development, a loan allegedly made under pressure from the government—to the extent that the leading bank may have feared it might be driven from business if it did not participate. Other bankers, observing the loan, have said it is unrepayable and suggest that it was a favor given for favors received.

In any event, for the most part, lending and borrowing is classic Euromarket-type activity, with most of the activity consisting of bookings entered in the Bahamas by headquarters banks in London, New York or Paris. The money does not see Nassau.

The view is widespread among U.S. and foreign bankers in Nassau, and among governmental authorities, that U.S. concern over the criminal use of Bahamanian Eurobanks is almost entirely unsupported by evidence. The Castle Bank case, now some 13 years old, is vestigially newsworthy, evidence Nassau people say of an unfair press coverage which makes ancient history appear to be a current problem. In that same way, Bahamians note that Vesco stays in the news, although at the time of his residency in the Bahamas he supposedly was not known to be in violation of either U.S. or Bahamian law.[51] It has been many years, they insist, since the Bahamas learned their painful lessons of prudent risk from careless bank licensing. In fact, there is little complaint over current central bank licensing procedures. Any continued shortcomings are laid at the feet of U.S. agencies which have failed to coordinate, cooperate or give a timely response to Bahamian inquiries.

These are minor complaints compared to the larger one said to be endemic among Bahamian government figures. They claim that the U.S. is not simply disinterested in, but is aggresssively snubbing them by way of executive policy. For almost two years there had been no U.S. ambassador. For many years the Bahamian chief of state was not invited officially to the U.S. (that altered in part by the Prime Minister's own initiative in 1982). The U.S. grants tourism convention tax favoritism to Jamaica but not to the Bahamas, even if the latter may be more dependent on tourism income—and has been a steadier friend over the last years—than Jamaica.

When U.S. tax "paranoia" expressed itself, as Bahamians saw it, in the "theft" of the Castle Banker's briefcase in the Project Haven/Tradewinds IRS operation, it was seen as an overtly aggressive act, threatening both the sovereignty and economic well-being of the country. Foreign bank executives refer to it still as proof of the danger posed by dealing with U.S. citizens as clients, and one government official warned that, were any repetition to occur, the Bahamas would lift the work permits of all Americans on the island. While the Castle Bank "briefcase caper" occurred in the mid-1970s, it was in 1981 that the IRS's Gordon report proposed that nations which failed to conform their procedures to U.S. requests in tax matters should be dealt with severely.

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[51] There is conflict on this point. We have not been able to examine the record to resolve it.

U.S. agencies have appeared recently to Bahamian authorities to be protesting the latter's failures to cooperate in criminal information requests, and indeed such agencies are perceived as claiming the Bahamas to be a widely-used base for laundering criminal monies. However "paranoid" that might seem to the ordinary U.S. citizen, there is a kernel of fact. One U.S. enforcement authority told us, "The U.S. drug problem is the Bahamas." Another advised that one U.S. agency is nearing a stage where it could and would indict high Bahamian officials were they to venture to the U.S., and that a "get tough" policy was in order. Furthermore, a number of U.S. enforcement officials would seem to be in sympathy with the tough Gordon proposals.

To these and other perceived or real U.S. complaints, Bahamian authorities react with two major contentions. One is that, procedurally, U.S. agencies are woefully ignorant of the means easily available under Bahamian law through which information may be requested in criminal matters to allow lifting of bank secrecy. As a corollary they argue that very few U.S. requests for information in criminal cases are ever made.

The second response is related to the first. If requests are so few, where is the evidence of widespread involvement in American criminality of the Bahamian banking and registered company system? As a corollary, given a high rate of criminality in the U.S., with apprehensions and convictions low by any world standard, is the U.S. justified in exporting to the Bahamas responsibility for its own failures in prevention, detection or prosecution of U.S. crime? Is the U.S. justified in expecting that any financial center can prevent all criminal monies from entering it, especially when it is U.S. banks and law firms which sometimes vouch for American parties to Bahamian business or government. Nassau institutions have no other resources upon which to call.[52] Thus, some local bankers and lawyers relying, on alleged screening attempts, say it is not their fault if undesirable characters slips through.

The operation of the system

These are the ways by which the issues are drawn. The following section examines the operation of the system, and such limited data as bear on the arguments.

First, the Bahamas do have bank secrecy enforced by the criminal law. The law was written only in 1979 and that at the request of the banking community itself when they learned, in consequence of a Canadian government request of confidential information by private persons as opposed to civil authorities.

Those in the banking community whose activities included trust banking (administered the monies of foreign persons, not interbank transactions) felt that, were the world to learn that Bahamian secrecy was a fiction, they would lose their trust business, even though this is only a small per cent of all assets. There is no secrecy necessary or practiced for any part of the interbank Euromarket transactions. Secrecy is only necessary for primarily individual accounts. We were told that most Bahamian account holders are European or Latin American but there obviously is no way to verify the claim.

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[52] Checks can be made through credit appraising firms, but their record is by no means reassuring, we are told. And whereas U.S. law enforcement personnel in Nassau complain that no banker has ever checked with them about a new client, it is likely that U.S. enforcement agencies, bound by privacy law, could not, in fact, respond fully to provide information requests.

Bahamian law does provide for the lifting of bank secrecy when an attorney petitions the Supreme Court for a court order releasing requested documents. Bahamian authorities argue that there is no need for a U.S. criminal trial to be under way, for a defendant to be indicated or for any U.S. court action yet to have occurred, but it must be shown that a crime has been committed, the proof of which bears on the requested documents, or that a crime is suspected, the proof of which rests on the documents. From this, the prosecutor's dilemma is apparent. Realistically, he is going to need an indictment and, if he has enough evidence to indict does he really need the Bahamian records? Moreover, court decisions are predictable; the court may also hold that criminal proceedings must be underway abroad. In any event, it seems to be agreed that, however corruptible the elected and appointed officials may or may not be, the court system is utterly without taint.

U.S. Embassy officials in Nassau confirm that requests made to them are few—only three in one recent 12-month period. Further, interviews demonstrate that U.S. agencies are woefully ignorant of proper procedures. Requests are made improperly, for example, directly to the Attorney General. Yet even though procedurally such requests should be denied, in each case of a U.S. criminal matter information was supposedly forthcoming within a few weeks. Thus the administrative perogative was exercised in favor of the U.S. even when the U.S. agency failed to conform to Bahamian law with respect to request channels.

There are two major aspects of the system which must be addressed, both of which are related to registered companies. About 25,000 registered (trading) companies operate offshore in the Bahamas; an estimated 15,000 of these are active. For about $1,000 any attorney may create a company quickly and the attorney is under no obligation to evaluate the applicant, nor may he be in a position to do so if he is not part of an international network of referrals and correspondents. The Bahamian government requires no screening or later reporting of company assets, although a clause in the law provides for the latter annually. For companies wishing exemption from local taxation, names of beneficial owners—to be kept secret, by law—must be filed with the central bank. However, no remedy exists for an application which conceals this fact, as for example when a Panamian nominee attorney files through a Bahamian one. Under Bahamian law, it is theoretically possible for a person falsely filling, i.e., where beneficial ownership is concealed, to be subject to assets seizure. Similarly, the law requires filing of ownership information with the central bank upon transfer of a company; again forfeiture of assets is possible. There is no case where the government has acted against any party for concealment. Some lawyers no doubt advise prospective owners not to undertake this risk.

In such instances, we were told, clients simply created registered companies in the Caymans or elsewhere, where no such risk is entailed.

There is an exemption to the rule of filing of beneficial ownership. When a company is formed by a bank, the bank may represent to the Central bank that the owners are non-resident. In this sense the bank becomes the nominee, with the government not requiring further disclosure. The loophole is a consequential one. Consider the following paragraph from the "Bahamas Handbook and Businessman's Annual" (Etienne, 1981) in its bazaar of opportunities as it discusses what holding companies can do:

> . . . transfer the legal title in securities options, commodities, real estate into an Investment Holding Company . . . managed by a Bahamian Trust Company. In such a shelter income and gains accumulate, tax free in many instances. Such a company can be incorporated with a minimum of formalities . . . The names of the beneficial owners do not have to be disclosed, since nominee holdings . . . are permitted. Thus a comparison can be made to the concept of companies using bearer shares in other jurisdictions. (p. 161)
>
> The Bahamian Trust Company . . . (is) able to cater to the most cautious and wealthy of investors . . . (it has) built in safety mechanisms which make legal control of foreign assets managed in the Bahamas (able) to flee automatically to other unnamed destinations should there be any sign . . . of taxation from within or without its shores.

With the opportunity for concealment offered by this provision, one wonders what the functions may be of those licensed but invisible trust companies in the Bahamas. For further security, if one held a Panamanian company which in turn owned a St. Vincent bank, which was, in turn, held by a company organized by a Bahamian trust, who indeed would ever penetrate that maze?

The second aspect of the operation of the company system turns on the matter of ethics. Reputable attorneys and bankers supposedly will not accept applicants or depositors without evaluation. The definition of this ethic by bankers was by informal agreement at a formal meeting in 1979. Several major banks are described as having "fallen away" from the rule of knowing one's depositor. There is good evidence that one major bank has accepted a publicized major drug trafficer as an account holder, through his registered companies. One major bank stands accused by other of having a policy of seeking—as well as accepting—suitcase currency. And a high official of the central bank itself said, "It is the duty of the bank to accept proffered funds. If you came into my office with one million dollars in your suitcase, I would take it." (Consultant interview)

According to several Nassau attorneys, it is generally believed that 20 percent of the attorneys practicing are unethical and will exercise no restraint with respect to persons on whose behalf they seek to register companies. Ethical lawyers in Nassau seem to agree that there is a serious problem in the use of trust banks and registered companies by unsavory characters. Since bankers and attorneys seem to be in a position to learn the character of their clients, by implication some bankers and lawyers are held to be in the witting service of criminal elements.

While it is generally agreed that the Central Bank functions well, the Central Bank does not engage in much bank supervision. A current case involving the Columbus Trust Co., with allegations of complicity at high levels, is a case in point. In an effort to follow-up on these allegations and to better understand Bahamian banking the staff sought to interview Donald Aberle. He declined the invitation through his New York attorney.

With respect to the Bahamian argument that the U.S. prove its case that criminal uses of the Bahamian banking system are widespread, one must conclude that the case, in fact, has not been proven satisfactorily. And there is no indication available to us that U.S. enforcemtn authorities operating on the island have given priority to these fiscal investigations.[53]

Yet even if the case against Bahamian banking for criminal involvement is not proven, there are ample grounds for suspicion. When senior local bankers and attorneys agrees that criminal abuse is taking place, when there is no enforceable ethic for the bar, when a handbook contains invitations to concealment and corporate illegality, when an official in the central bank states he will take the million dollars in a suitcase, surely the American fears are not without basis. Indeed, it is not impossible that U.S. indictments will emerge in the not-too-distant future to demonstrate complicity between drug traffickers, bankers, attorneys and government officials. If this is so, Bahamian authorities ought to be persuaded that the U.S. does have justified concerns. Perhaps at this stage of development it must be so, for as one wise local executive put it,

> The Bahamas must do things which are not allowed in the U.S. because to do things which are allowed in the U.S. is non-competitive, since in every instance the U.S. does it better than the Bahamas do. The Bahamas are therefore compelled in banking and trust operations to appeal to unallowable activities and by inference to appeal to activities disallowed in the U.S.

Nevertheless, judgments offered by U.S. State Department personnel, foreign observers, and Bahamian ministerial-level officials seem reasonable: the long-term interests of the Bahamas and the U.S. are best served by close and constructive relationships, not ultimata. The paramount concern is the stable economic and political development of the Bahamas, a development which cannot take place unless its major industries—torurism and banking—are encouraged. Tourism and legitimate banking simply cannot be disrupted. Common ground must be found which allows for this goal but the Bahamas must, at the same time, recognize legitimate U.S. interests.

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[53] One has the impression that combatting drug traffic itself over these thousands of miles of ocean and island has been their sufficient daily headache, one marked by inconsistency in Bahamian enforcement enterprise, and sometimes by insensitivity to sovereign rights by U.S. authorities engaged in hot pursuit. As one observer put it, "You must learn that the Bahamas are not part of greater Dade County."

We are both, the U.S. and the Bahamas, part of each other's crime problem, or jointly, we share a crime problem, or more optimistically, we may assist each other as resources in crime control If so, it is obvious that the next steps must be ones that enhance communication, mutual resolve, and mutual assistance.

The following suggestions are proposed:

Pursue vigorously, complicity in drug traffic by Bahamians at any and all levels. When sufficient evidence for U.S. indictment exists, make arrests when visits to the U.S. are made. Extradition may also be sought. If extradition is denied, widespread local publicity should be given charges and evidence not prejudicial to later successful trial.

On the other hand, U.S. agency personnel should avoid accusations of Bahamian criminal complicity which cannot be documented. Avoid complaints about non-cooperation in the provision of information through existing channels when protesting U.S. agencies are, in fact, unaware of proper channels or have not sought information through them. U.S. agency personnel should also avoid the all-too-apparent tendency to export responsibility for U.S. drug traffic. The paramount focus for such crime is, in fact, within the U.S. due to U.S. demand and internal distribution facilities.

Circulate and make centrally available on request full information on procedures to be followed by U.S. agencies seeking information pertinent to criminal investigation and trial. Coordination with the U.S. embassy is essential, since proper local procedures require that local counsel be engaged. Be aware that competent, ethical local counsel is available and should be selected through the embassy.

United States agencies can improve coordination to provide information to Bahamian central bank authorities when they make requests about license applications.

As an incentive for *quid pro quo* agreements, consider the extension of the convention expense tax deduction.

Should it be determined that, as often alleged, narcotics traffickers are exploiting Bahamian banks and companies, train Bahamian police personnel in method of financial investigation. Provide those police units found trustworthy with equipment and information access. U.S. personnel capable of financial investigation should be made available on loan to the Bahamian government. Such personnel, while serving that government, must be sworn to non-disclosure under Bahamian secrecy regulations, an important feature of which is agreement not to act on information discovered which bears on violation of U.S. tax laws, as distinct from common and business-type crime.

Open discussion with the Bahamian government to learn if guidelines can be developed to assist in defining evidence, argument and judicial decision where foreign authorities have made information requests in criminal matters.

Consider the feasibility of negotiations leading to agreements for bilateral cooperation in cases where the U.S. offender is also in violation of Bahamian law by wrongfully concealing beneficial ownership from the central bank.

Should it be requested, personnel and other aid could be provided to the central bank through international institutions, to assist in expanding bank supervision, including policing of filings of beneficial ownership under company registration and transfer. Agencies such as the IMF would appear best suited for such a role.

Recognize that the Bahamas have a large international banking establishment and proposals for a coordinated international approach to the requirements of bankers' diligence are appropriate here.

Over the long term, seek to negotiate a treaty of mutual assistance in criminal matters on the Swiss model. Recognize that the internal resources of the Bahamian government are not sufficient for, nor is the current socio-political environment conducive to, the kinds of efficient record-keeping, administrative control and untainted enforcement which an advanced nation enjoys. Be prepared, therefore, to assist the Bahamas through seminars, exchanges and the provision of technical assistance in public administration. Because of both U.S. and European budgetary problems, assistant funds are limited. Efforts to persuade U.S. banks currently operating in the Bahamas to provide their trained personnel as part of assistance programs, even on part-time loan, should be explored.

Bermuda

Bermuda is a small colony, homogenously English yet with its most important economic ties to the United States. It is characterized as self-confidently and competently governed and, in business, well managed. It enjoys a very low crime rate and no notable corruption. Bermudians are proud of their heritage, intent on shaping their future and committed to their often unwritten ethical and procedual codes. Ten per cent of their land mass is used by the U.S. Navy as an essential base for America's antisubmarine defense.

Bermuda is a tax haven which prefers not to be called such if there is any hint of impropriety impled. Its major offshore business is insurance; second are trust-like personal investment companies. These account for about 40 per cent of the GNP. Bermuda also derives major important income from tourism, although in its future planning it emphasizes financial activities since these are less vulnerable to income fluctuation and provide a more capital-intensive use of a tiny land area. Growth is limited. Bermuda is not in competition with other offshores for new business except that which will be capital intensive within its defined financial interest range.

There is almost no Eurobanking if defined as participation in the fast turnover interbank Eurocurrency market. The three banks on the island are largely home owned and exercise what would elsewhere be considered incredible cartel powers, with the result that bank profits run at 30 per cent on investments. There is no central bank and no external bank audit, but a monetary authority does advise on fiscal policy and superintend company registration. Political policy is conservative; the budget is balanced; there is no national debt. Banks, the insurance industry, and others are self policing in a system where a socially cohesive elite simultaneously manages business, government and informal social policy. Its capitalism is fundamental to its ethic, economically refined and thoroughly protectionist.

Bermudians told us again and again that they will in no way act to jeopardize their relationship with the U.S. which they recognize as fundamental to their success and defense. Accordingly, every effort is said to be made to prevent any use of the offshore industry by criminal elements. Some efforts clearly are made to screen new offshore business and personal investment company applicants. That screening is via inquiries and referrals through the acquaintance network which links major banks, law firms and insurance companies internationally. It is supplemented by a monetary authority's supervision.

Bermuda, like most nations, does not intend to police other states' tax laws. Bermuda, like Switzerland (in this and many ways), has no criminal law governing tax minimization, nor will it act to supply confidential information relevant to tax evasion cases under investigation by other nations.[54]

About a decade ago its governor, police chief and an aide were assassinated. Two were convicted and executed, these characterized to visitors as typically deviant individuals caught up in a local version of black power, anti-authority, and otherwise politically agitated in the mood of the time. There may be, however a political balance which could be upset by any major shifts in U.S. policy toward Bermuda which would result in financial instability. Discussing their concerns over U.S. policy, the Bermudians make no threats, propose no blackmail, but quietly, eloquently, observe that U.S. as well as Bermudian interests are best served by the collaborative status quo. It is a status quo where public strains arise from the U.S., from the Gordon report threatening economic warfare against offshores which do not provide information to assist the U.S. in its prosecution of tax evasion, and from the failure of the U.S. to provide for Bermuda what it does for Jamaica—the deductibility of convention expenses.

Other problems are also associated with Bermuda's offshore activities in relation to other nations. Recently a Norwegian promoter, criminally charged by his government for burying monies in Bermuda, was convicted on the testimony of a Bermuda police investigator who obtained the records of the offshore company and proceeded, with the approval of his chief, to Norway. There was considerable local distress in the business community for that disclosure was seen as a violation of Bermuda's assurances of confidentiality, a violation threatening the trust of foreigners in Bermuda's commitment to necessary business secrecy. As a result, the police are now under more careful control, somewhat unhappily serving, as one police official put it, the "business-political interests who put business ahead of simple right and wrong."

On another occasion the Attorney General, "too assiduous" some complain in his combat against white collar crime, provided information on request to the Canadian government in a borderline tax-criminal matter. More distress ensued. The Attorney General, who by regulation is the person to receive and evaluate requests for information from foreign missions or consulates, is now advised to present any proposal to provide information to an informal committee on investigations which will decide, as a "sagacious watchdog," whether or not he may proceed to ask for a court order lifting secrecy.

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[54] That rule is common internationally. Nations do not assist other nations to enforce a tax law which does not exist in their own jurisdiction.

The committee staff itself is informally constituted and, in theory, the Attorney General supposedly can act without seeking its approval. Indeed, direct requests for information come from police department abroad to the police. Ordinary criminal data may indeed be exchanged but in any matter of information bearing on company finances, the police are not to act. The proper path is to the Attorney General, and thence the committee. Bermuda, aware of an unsure line between tax evasion and other criminality, does not wish to jeopardize its offshore clients in any matter interpretable as primarily a tax matter.

This is not to say that Bermuda is accused of not cooperating in matters where common criminal conduct rather than tax evasion is at issue. Yet, since the IRS particularly is suspect because of its use of informants (some in Bermuda term such informants as "vengeful" and false in allegation) the courts will require hard evidence of wrongdoing. Bermudian law allows foreign enforcement officials to work on the island, once a case is known to be criminal, interviewing witnesses and defendants and gathering evidence.

There are about 5,500 exempt (offshore) trading companies (including insurance and personal investment companies) registered on the island. To assure responsible offshore conduct, each must have local directors who are local citizens responsible to Bermudian authorities should something go amiss. Exempt companies must be audited and directors are held responsible for diligence in supervision. Management of personal investment companies is also local, although beneficial ownership is foreign. It is estimated that most such owners are U.K. or U.S. citizens.

Bermuda has no secrecy law backed by criminal sanction, although it is said—that after the Norwegian affair, a wrongful disclosure statute was drafted. Bermudian authorities are described as preferring to follow U.K. legislation whenever possible, since they feel the inadequacy of their own legal research and legislative drafting resources. Thus, whether a wrongful disclosure statute will in fact be enacted, or whether Bermuda continues to rely on its characteristic normative sanctions, one cannot be sure for officials do not offer entirely consistent information on this point.

Confidentiality is most aided by the statutes governing how companies are formed. While bearer shares are not allowed in those non-exempt companies which hold interests in local Bermuda business, they are allowed for the offshore, exempt companies. It appears that, in either exempt or local companies, nominees may hold shares on behalf of others and both banks and law firms do hold such shares. Holders are obliged to have personal knowledge of those beneficial owners on whose behalf shares are held and, further, if there is a change in beneficial ownership, the monetary authority must be notified. In the case of shares in Bermudian entities, if a bank does act as a nominee the shares must be physically held by the bank itself. The bank will hold them in the name of the real owner.

The monetary authority is itself obliged, except under court order, not to disclose the names of beneficial owners which appear on its records. That authority, one is advised, must receive identifying data from bands[55] and attorneys about all applicants for exempt company status. Futhermore, the authority is said to require such applicants to be recommended by well-known foreign banks or other institutions. Small private bank references are not acceptable, for the authority is aware that the applicant may himself be the concealed owner of the recommending bank, as can occur, for example, with St. Vincent, Anguilian, Antiguan or Montserrat banks.

The monetary authority is supposedly creating a computer file of information on all past applicants and all present owners of exempt companies. The same file will contain all business associates past and present insofar as these can be determined from the application and required references. All companies with whom the applicant (individual or corporate) has had an interest will be on file.

Officials describe the utility of this file and their belief that a like system should be available internationally. In design, each nation would contribute information to a central computerized file about business-type criminals. Any nation receiving an application for a bank license or a registered (exempt, trading, offshore) company could search the file as part of the vetting process. Both Bermudian and Swiss authorities have proposed that the Bank for International Settlements consider superimposing this credit-character-criminal intelligence file on its currently proposed improved information exchange for governance of offshore banking. Such a step would move toward a dramatic change in the definition by central banks of their responsibilities, and of international facilities available by which to improve Euromarket reliability.

The existence of the intelligence file in Bermuda does not assure that all applicants approved will be sterling characters. Both officials and executives admit that bad characters do slip through the net, either because trust in major offshore recommending sources proves misplaced, or, presumably, because of lack of concern. In practice the Bermuda screening procedures is designed to work much like the Swiss Convention on Diligence which requires bankers, lawyers and others to know their foreign clients and the source of monies, where failure to perform diligently is punishable.

There is also an issue posed by the present self-policing apparatus (in lieu of central banking). It is one of prudent risk. Commenting on the 30 percent rate of return, officials said that there are serious current risks of insolvency. The Bermuda banks are characterized by some of these officials as in fact engaged in imprudent practices such that all investors are at risk, absent central bank controls, without the protection either of disclosure via audit or reserve requirements or precautionary interventions. If this is so, foreigners whose assets are managed through personal investment companies held by or in local banks are also at high risk. These officials also contend that Bermuda would benefit from the presence of major U.S. international banks on the island whose headquarters supervision by The Federal Reserve and the Comptroller of the Currency would serve as a model. These banks' presence would also destroy the local cartel which severely depresses interest income available to depositors. (Because of the monopoly, maximum interest paid was 7 percent, yet money was let at LIBOR rates of 17 percent or higher.) Furthermore, local depositors, given a free market choice on interest returns, would also probably exercise the prudent choice of banking in institutions externally regulated to safeguard their investments.

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[55] A bank itself may initially petition for a court order to protect itself against a depositor/client, for example in a case where the bank concludes that proceedings against the client are in order.

The central thrust of the argument most often advanced in Bermuda holds that the U.S. dare not develop a uniform policy toward all offshore havens based on the false assumption that all havens are alike. Bermuda, they point out, in no way resembles any of the Caribbean havens south of it, neither the Bahamas nor the Caymans. Nor is Bermuda like St. Vincent, with its bunco banks, or Panama, with its worldwide invitation to foreign registered companies. Bermuda, they say, is a special case and one deserving of appreciation rather than threat or censure.

It is indeed wrong not to perceive the diversity among the offshores and the unusual nature of Bermuda which has no offshore banking at all, registers no freebooter carte blanche exempt companies, and far more free of crime and criminals than is the U.S. itself. Thus, a report such as the Gordon report—widely read and reacted to in Bermuda—which is seen as tarring all the offshores with the same brush, is characterized as a very disturbing document indeed. It gives Bermudians the appearance of the U.S. government failing to acknowledge the cooperativeness of Bermuda with the U.S. in the provision of information in all criminal matters, except straightforward taxation.

As for taxation, Bermudians say it is the sovereign right of one nation to have its own legal and fiscal codes and not to be compelled to conform its tax law—contrary to its own social, moral or business ethic—to that of a foreign power. Bermuda elects, like Switzerland, not to apply the criminal sanction in tax matters, not to its own citizens and not to non-citizens doing business there. Bermudians we spoke to insist that Bermuda will not conform itself to U.S. demands on exchange information on tax matters, for this would be entirely destructive of the offshore financial industry upon which the future plans of Bermuda rest. International business, they say, requires confidentiality with respect to its finances and transactions, and will not locate where such confidentiality cannot be assured.

Yet at issue for us is the assumption that the local arguments for confidentiality are to be accepted, unexamined, on their face. We simply do not have enough information about the inner workings of exempt companies in Bermuda to be able to assess the importance for captive insurance or, now formative, shipping companies, for such absolute guarantees of confidentiality as Bermudians seem to hold are required. No one is proposing that corporate matters routinely be published. Since these major corporate enterprises, when held in some subsidiary relationship to companies headquartered elsewhere, do conform to other national law, may be required to report offshore incomes, and do act in conformity with regulations of the company,[56] it is questionable whether the present Bermudian ethic against disclosure operates primarily, as it is claimed, for these businesses per se.

The alternative conclusion is that the primary beneficiaries of strict confidentiality are the owners of the personal investment companies. One must ask if the Bermudian emphasis on secrecy is not in fact intended to serve a purely tax motive, and if so, can Bermuda be persuaded to change its position?

The issue is once again whether the U.S. gains more in the short run than in risks in the long run by seeking to force concessions in Bermuda with respect to exchange of information in tax matters. Negotiations have not begun; one has no idea how much Bermuda might concede simply under the threat of, as opposed to actual recourse to, the measures recommended in the Gordon report. Nor can one estimate what the Bermudians might do if offered the incentive of the convention attendance tax deduction. But were Bermuda not to concede on the exchange of information, is the U.S. gain so great? Do we have such knowledge of widespread use of banks and companies, established in fact to evade taxation, that we would jeopardize our relations by applying economic sanctions?

The following suggestions are proposed:

Consider *quid pro quo* negotiations with Bermuda whereby, in return for the convention tax deduction, steps are taken toward a treaty of mutual assistance in criminal matters. Important is an effort to include tax fraud in the definition of a criminal matter. Since present cooperation in exchange of information is excellent, treaty would formalize already ongoing procedures.

Consider entering into negotiations to provide skilled criminal-financial investigators to work on cases since Bermudas financial police resources are not adequate.

The Bermuda bank and company license computer intelligence file being put in place may be a model for haven countries. However, it suffers from the absence of an international storage and access mechanism whereby Bermuda (or any other jurisdiction) can call on information worldwide about individual or company credit, character, criminality or business associations. An important first step is to define where in the present international bank and police network such a central facility might be created. Most often suggested is that the Bank for International Settlements augment its present functions by providing physical facility for this. Interpol must also be involved as must improved internal networks within the U.S., and improved U.S.-Interpol coordination.

There are no foreign banks in Bermuda, so no home country leverage is available. Negotiations must proceed on the assumption that the supposedly high integrity of professionals in Bermuda, and its recognized interdependency with the United States, imply that there are no insurmountable obstacles toward arriving at a diligence (screening) agreement, provided that the recommended diligence is limited strictly to matters of common crime, including managment and tax fraud.

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[56] There is legal and socio-political dispute over the moral legitimacy of current U.S. law constraining overseas captive insurance companies. As exemplified by the Carnation case, where charges were filed for a Bermudian captive insurance operation, it has been argued that the body of U.S. law restricting self-insurance via overseas captives represents special interest legislation favoring the U.S. insurance industry. In opposition to the argument is the claim that offshore insurance facilities represent an increasing threat of fraud. We regret that we are not able, in this report, to address the criminal aspects of offshore insurance and especially reinsurance operations.

Perhaps some cases of criminal exploitation of Bermuda institutions arise from poor information transmitted to Bermuda banks and professionals from recommending U.S. banks and law firms. When U.S. institutions fail to be diligent, offshore authorities exercising diligence are not to be held responsible. U.S. institutional practices, as noted in the prior section, must be improved.

As we will discuss mechanisms useful for Bermuda (or Antigua) will also be applicable elsewhere. The creation of an international cadre of financial investigators, the development of international computerized police/banking intelligence facilities,[57] preferably with BIS and Interpol involvement, and the need to improve within the U.S. the adequacy of information provided on request to Bermuda authorities are all activities with a potential worldwide constructive impact.

Montserrat

Montserrat is a small British colony with a balanced budget, an integrated peasant (market) economy, socially stable, without unemployment or a population explosion. It is governed by a British governor and a small staff in cooperation with a chief minister and his cabinet appointed from elected members of the legislative council. In the present government there is no indication of tolerance for corruption. Relationships between police and other local officials and foreign enforcement personnel are characterized as mutually cooperative and respectful, with entirely free exchange of information on all criminal and, indeed, on all bank and company matters.

Montserrat derives its income from a marginal economy including tourism, customs and excise taxes, property tax, postage stamp sales, light assembly industry, and offshore companies/banking. Agriculture and industrial development is hoped for. Tourism for middle or low income travelers is not to be broadly expanded since the island is small and such tourists have already come to be associated with undesired local effects (drug traffic, public misconduct and theft, all of which fall under opprobrium in this morally integrated society).

Three commercial banks operate locally and about 66 offshore companies operate as banks, with more in the mill. There are also offshore companies acting as trusts, or in capacities unmentioned and unknown. Initial licensing of these offshore entitles contributes 5 per cent of annual government income, replacing almost exactly the recently withdrawn [58] U.K. general subsidy. Without bank licensing fees, Montserrat would have an unbalanced budget. Budget balance is so important locally that it is widely believed that an unbalanced budget would lead to the fall of the elected government. Likewise were a governor to seek to block licensing of a bank applicant, it is held likely, given his weak statutory power, to lead to a devastating constitutional crisis.

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[57] Interpol and other police officials caution that the development of such computerized facilities is likely to be a slow process. Problems to be solved include national privacy legislation, and matters of trust when one nation may have police officials with access to such data who are suspected of being tied in with offenders. The U.S. Freedom of Information Act provides, for foreign nations, some of the same risks insofar as their confidential data, once in U.S. hands, may then be accessible to the public. It is also the case that many Interpol members lack computer facilities—and associated support—capable of linkage to an international net. To develop that capability will be costly in terms of personnel and equipment. Formal agreements would probably be required to define who would have access to the file, what standards of evidence would be required to enter a name, what independent "audit" group would test national systems, etc.

These Montserrat offshore banks ("class B" under legislative terminology widely found in Caribbean regulations), like the predecessor EuroBuncoBank in Sark and now banks in Anguilla, St. Vincent and Antigua, are not performing the usual interbank Eurocurrency or trust administering functions of Eurobanks.[59] They are creatures of the Euromarket regulatory system, caricatures of a Eurobank, unregulated, anonymous, international, but private.

There is no official on Montserrat, or indeed in the U.K. Foreign Commonwealth Office or the Bank of England, likely to speak in favor of the current uncontrolled, unsupervised, sometimes scandal-generating offshore banking system. Officials widely believe that their banks are used for tax evasion, for criminal fraud, to establish false credentials, credits or assets, or are otherwise employed in a manner damaging to the reputation of the island and the interests of persons who might deal in good faith with a Montserrat offshore bank. It is claimed that Montserrat would immediately shed its offshore industry if substitute funds could be found for budgetary purposes, as for example, were the agriculture or industrial sectors to produce more income, or were the U.S. to be persuaded to provide financial assistance equivalent to the offshore licensing revenues (thus replacing the British supporting role). In the absence of such budget balancing over the short term, the present governnment is adamant that the licensing of offshore facilities will continue. As an interim corrective step, Montserrat is acquiring a visiting bank advisor.

There was no planned offshore banking in Montserrat until the 1978 passage of an unusual law creating a free banking zone, a law subsequently disapproved by the UK Foreign and Commonwealth Office on the advice of the Bank of England, and reversed in its effect by an amendment supported by both the governor and a newly-elected administration. Offshore banking had existed earlier in Montserrat, beginning with an American who learned that a company could be founded with "bank" or "trust" in its name and could therafter function offshore as such without regulation or control, since Montserrat had and has no central bank nor other controlling mechanism. Indeed local commercial banks are unsupervised except by their respective Canadian, U.S. or U.K. headquarters.

A series of patchwork amendments has been added to the 1976 (amended 1978, 1979) banking statute which seeks to bring a semblance of control, at least in language and administrative procedure, to bank licensing. To form a bank, one applies for a company, pays a small initial fee, then seeks approval for its operation as a bank, and then, with that approval given, proceeds to pay final fees and to function. The procedure is undertaken by any one of four local lawyers, costs under $10,000 when principals work directly with local attorneys, and may take from a few weeks to four months. To speed the process, local attorneys intervene with elected officials to give priority approvals. Even so, attorneys express dissatisfaction with delays and sometimes hold the police responsible for delays attributed to overly close police interest in applicants.

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[58] There are conflicting accounts of forces leading to the end of U.K. aid, U.K. officials deny that the subsidy was "withdrawn," stating that Montserrat asked that aid cease. Local elected officials claim otherwise.

[59] The IRS ruled (December 1982) that a controlled foreign corporation qualifying as a class B bank is not engaged in the banking business. Interest income is therefore required to be included in foreign personal holding company income.

Montserrat allows a system of bank application which is itself "offshore," i.e., a brokerage one. It is a mechanism similar to that employed by St. Vincent [60] for both jurisdictions provide that a foreign commercial entity may apply on behalf of, and representing, foreign persons to establish companies *qua* banks. Until recently, the U.S. company so engaged—and reported to have founded 45 of Montserrat's banks—was allowed to serve as a nominee, i.e., to create a bank without revealing the name of the beneficial owner. This system, local legal authorities say, was contrary to Montserrat law but not contrary to Montserrat practice which, as we shall see, may proceed with little regard for the language of statutes. At present the American group applying on behalf of others must not only identify initial beneficial owners but must provide vetting in the form of character and credit checks. The mechanism is unsound in the eyes of local authorities because vetting is done under the authorization of and forwarded to Montserrat by the same company which applies for the license. It does not appear that vetting is required for applicants not forwarded by the current American bank brokering firm, although in both cases the final submission of an application will be by a Montserrat attorney.

There is no bank secrecy law as such in Montserrat; indeed there is not general body of coherent banking legislation. English common law does, however, provide for confidentiality and a confidential information statute exists which holds that communication between clients and professionals is privileged. However, this statute does not apply to information in government possession, whether submitted by lawyers or banks. The government, in turn, should, by statute, know the names of all shareholders of all companies, be advised of transfers of ownership, and should receive annual reports. Thus, in theory, the government is possessed of information about company/bank beneficial ownership and activities. Local attorneys interpret the statute to mean that they can divulge information only after the Attorney General has rendered an opinion declaring privilege void, as for example when a foreign authority presents adequate reasons to assume that a licensee is engaged in a financial crime. If no evidence of fiscal crime is presented, one attorney noted, even if other crimes are shown, that should not be sufficient reason to waive privilege. Foreign authority can, on the other hand, request information from Montserrat government records. There is no statutory constraint of any kind on the Montserrat government which restricts transmittal to the requesting authority. Note that this is the theoretical legal status, not the practical one.

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[60] St. Vincent at one time maintained a trust authority office in a Zurich law firm through which bank licenses may be obtained.

The flavor of the practical situation can be offered by example, the history, as we understand it, of the 1978 banking statute's passage and its aftermath.

A historical example

By 1978 Montserrat realized it had an offshore banking industry, through its registered companies, yet was without any authorizing legislation. The then elected government considered a banking statute and, while doing so, appears to have been approached by a North American group (code-named by government officials in our 1979 conversations as "Zet," derived from Free Banking Zone, Montserrat) which had been frustrated in its attempts to create a free banking zone in nearby Antigua.

Zet came forward proposing a zone consisting of a building to be built at the airport which was to be free of any airport arrival or departure controls by Montserrat immigation, police or customs inspectors. Nor, of course, could there be bank supervision of which there was none in any event. The bank was described to members of the government as one in which physical vaults would be created for the actual storage of valuables by clients. Each client would have a vault, a secret numbered account, and each client account would in turn be licensed as a bank itself by Zet, which would have a franchise enabling itself to create these subordinate banks through sales. It was to be a "state within a state." Zet representatives are reported to have indicated to senior government officials that their clients would be rich Europeans seeking security or movie stars, that there would be hundreds of millions of dollars passing through the bank as well as valuables stored there, that proceeds would derive from the offshore fishing and oil enterprises of Zet, that the Zet bank itself would engage in multiple million dollar transactions, that Zet intended to launder hot money, or that tax avoidance only was intended. Obviously one does not get a consistent account of Zet's planned functions.

Zet arranged, we are advised, to have a statute written, tailored exactly to its wishes, among other things setting forth no licensing fees but indicating instead that fees would be set after discussion between applicants and officials. The "bait" (as one minister called it) was that the government would receive 1 per cent (some recall 0.5 per cent) of all monies transiting the bank.[61] Since there was to be no auditing or other reporting, the mechanism considered was that one senior member of the then government would be physically present to assess and collect the 1 per cent payment [62] as incoming-outgoing monies were counted. This method immediately was seen to present a problem for, as members of both the past and present government rather humorously said, the question was, was there any member of that government honest enough to be trusted to report accurately on the count? The fear was the the "teller" would underreport the take in order personally to pocket some of the "tax," or would accept side money from Zet in conspiracy to underreport.

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[61] No satisfactory explanation is offered as to how a bank could afford to "tax" itself this astonishing amount. A one percent fee is typically charged to customers by banks for laundering funds, although the fee may be as high as 5 percent.

[62] In what was apparently a slip of the tongue, one of the participating officials told interviews that the money, otherwise said to be for the government, was "per person" for participating officials.

Passage of the statute came in an election year, and it became the subject of a storm involving both parties and the U.K. Foreign and Commonwealth Office. The then opposition candidate for chief minister accused his opponent of having taken a $50,000 bribe from Zet and told interviewers that the check had been drawn on a Swiss bank and probably deposited through nearby St. Kitts or Antigua. Charges of "Mafia" associations and then ties to U.S. labor racketeers were made, although, as with the bribe accusation, without any proof being presented. The Attorney General was accused of complicity with his minister in bribe taking, and was reportedly removed on orders of London. There appeared, however, to be official U.K. concerns that the complicity charges might be correct. There was an appearance of impropriety, although certainly no wrongdoing proved simply by drafting a statute at the request of a chief minister.

Local parliamentary leaders stated that they filed complaints about Zet and alleged payoffs with U.K. officials. Foreign and Commonwealth Office personnel, on the other hand, deny any knowledge of such complaints being lodged. The British governor, abroad during the heat of the incident, is reported to have been deeply concerned about the intent of Zet. During this period, it is reliably reported, the governor requested of the Foreign and Commonwealth Office permission to bring an International Monetary Fund presence to the island so as to impose central bank-like regulation. The Foreign and Commonwealth Office is said to have refused the request, although the Bank of England supposedly does oppose any careless offshore banking industry.

In the meantime, the new banking statute was submitted to U.K. authorities who have the right to withhold approval, a very limited right for the Montserrat administering government is almost uniquely limited in its powers. Under these available powers, the statute was denied approval.

With the election came a new government which, in concert with London, the local governor, and its own inclinations, concurred in an amendment to the statute reversing its effect, i.e., stating that all regulations of prior banking were to apply to any banking free zone; thus there would be no free banking zone. No member of the prior government or public officer was charged with any offense by the new government. London authorities took no further action. Zet, however, had not quite abandoned its efforts and paid for the travel to its U.S. headquarters of the newly-elected government along with their Montserrat attorney. During the visit, it was the impression of the new leadership that Zet wanted a laundry, contraband facilities, and even sovereignty, and further, might be willing to pay for it. Negotiations apparently continued for a while, with Zet represented by its Montserrat attorney, but eventually came to naught.

The foregoing incident, still a mystery as to Zet's motives, does demonstrate the possible attraction of free zone banking.[63] The incident also provided an opportunity to explore with UK officials their own views of the Caribbean situation.

Views of the United Kingdom

The UK Foreign and Commonwealth officials, speaking unofficially, agree that there is widespread criminal abuse of Caribbean banking, much of it in the former or present UK dependencies. It is granted that there is fraud of various kinds, laundering, risk of insolvency, a threat to local political stability because of corruption, and the infiltration of undesirable foreign elements.

At issue is whether anything effective is to be done about it, and who is responsible for protective actions. As viewed from London there seems no question that: (a) some offshore banking jurisdictions simply lack the resources to police (the Turks and Caicos are used in illustration; they cooperate with foreign authorities but cannot control what goes on in the outer reaches of their own extensive island and ocean territory); (b) some governments are corrupt, with officials deriving direct benefits from ties to criminal elements of many sorts; (c) some jurisdictions are simply out of control, lacking governance capacities of any kind sufficient to understand or supervise any fiscal activities ongoing. Adequate language in law may exist but no implementing mechanisms are to be found.

As London sees it, the crime problem for the most part rests with the U.S., for whether it is drug money or other fraud it derives primarily from U.S. sources, i.e. criminal transactions in the U.S., and is processed offshore on behalf of American citizens and companies. The problem is compounded by U.S. agencies which do not cooperate with one another and do not follow any uniform policy. That, in relation to banking crime, is a small mirror of what these officials contend is the disorganized foreign policy of the present U.S. administration including inadequacy in the Caribbean.

Associated with this failure is a U.S. political and ideological attempt to export the responsibility for U.S. crime. Unable to control or clean up its rampant onshore criminality, i.e. drug traffic or financial crime, the U.S. blames other countries for it. London officials also contend that for the U.S. to perceive the locus for crime as offshore is not productive from the standpoint of control. If one has success in suppressing activities in one area, criminals will simply migrate to new sanctuaries. Foreign and Commonwealth officials used the analogy of pressure on one point on a balloon leading to distention elsewhere. Thus, it is argued by London that control efforts will incur only costs but no benefits. Given these conditions, whatever the U.S. policy, it behooves the U.K. not to involve itself collaboratively.

Foreign and Commonwealth officials did grant that there were developments which could be applauded, for example, the creation out of ECCA of a central bank for the East Caribbean. That plan originally was one "imposed" by the UK in cooperation with the IMF as independence for the many islands developed. However, present conditions in the Caribbean do not make London optimistic. The states operate for short-term self-interest without any interest in or capacity for regional cooperation. Further, the sophistication, skills, intentions, ethics of local politicians do not lend themselves to measures for the common good, such as a central bank. The U.S. might wish to push toward this goal. But the officials with whom we spoke felt the influence of a regional central bank may have less than a curative impact on present practices.

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[63] A similar scheme reportedly set up briefly on St. Kitts about 1978 allowing for uncontrolled entry and exit to the American-run casino. Years before, Freeport, Bahamas had such a design.

Thus to encourage the further involvement of the U.K. in the Caribbean, it would be helpful if the U.S. made major systematic, realistic commitments to induce coordinated activity and economic support in the region. Whether the Caribbean Basin Initiative is substantial enough proof of U.S. commitment remains to be seen.

In the matter of the value to the offshores of financial institutions, the scholarly arguments that the contribution to the local economy is small miss the point. Any money, observed these Whitehall officials, is welcome in a poor country. Bank licensing fees are so important that no Caribbean nation will care where the money comes from. They will continue to encourage companies and banks utterly indifferent to U.S. criminal concerns.

Whether it is the business of governments to seek to prevent offshore crime is an issue which must be addressed, Foreign and Commonwealth officials noted. The EEC and Switzerland, for example, appear to be moving toward an expansion of the Swiss concept of the Convention on Diligence, i.e. that bankers and attorneys throughout Europe will be held responsible under the law for inquiring after the bona fides of clients and the origins of new money deposits. But if crime exists offshore, unimpeded to date by the concerted efforts of the FBI, DEA, Comptroller, SEC or IRS, how could other advanced nations conclude that mutually in policy will improve matters?

The powers of the UK vary with respect to banking controls over dependencies. In Montserrat, it has little power, and officials state that the UK cannot enforce anything Montserrat does not wish to have enforced. The UK presence in a dependency may be one or two officials, nothing more. U.K. powers over the Caymans are unclear. Caymanian authorities seemed confident that local banking and company practices would not be upset by their parent government.

If anything is to be done, it will be done slowly. A mechanism to improve the quality and exchange of information on applicants for licenses would be useful, not now to all countries, but to some. Education of Caribbean politicians and financial officers would be in order. Perhaps the U.S. would wish to embark on conferences and seminars for them; if cleared in advance with the Foreign and Commonwealth office, there would be no objection. Further, U.S. agencies do not know how to proceed with information requests; they do not even know the offshore law. At the very least, the U.S. can remedy this internally.

Local appraisal

We have earlier stressed the importance of understanding what really happens in the offshores as opposed to what the law says or what institutional charters may mandate. Montserrat illustrates how the best of intentions, when not reinforced by adequate resources, are insufficient. It is important that there be this understanding, because the policy problem for the United States, or the UK, is not that of getting agreement on what ought to be, but rather on finding any acceptable way to achieve it.

Here are direct quotations from Montserrat authorities and attorneys, the former all leading members of the past or present government, or elected or appointed Montserrat natives or Englishmen in government service:

Address for serving notice

One is not even able to service notices on anyone . . . (for we) do not even have the addresses of the companies . . . a company may exist without any connection whatsoever to the Government of Montserrat, not even an address.

Annual returns, shareholders

The annual return requirement (public reporting) applies to banks as registered companies, but in fact no annual returns have been submitted for many years either for local or for offshore companies. Furthermore, with respect to companies registering upon application, in principle the names of all shareholders must be submitted. But there are many cases on file where the names submitted are in fact the local lawyer acting on behalf of an unidentified applicant . . . no one knows who in fact the shareholders or owner are . . . there is no apparatus for checking, for enforcing . . .

Assets

(With respect to assets reported in license application) . . . there is no government inspection . . . even local banks do not need to publish their balance sheets.

The government has no proof of assets of any kind.

Beneficial ownership records

Whatever the requirement under the law, bank owners seem to have sold banks without informing the government so that one may not, in fact, know who the new owner is.

The owner of public record may only be (in conflict with law) a nominee.

The beneficial owner's name is supposed to appear in the (public) company register, but fronting occurs.

No one knows who is supposed to know who beneficial owners are, and, in any event, no one is there to look.

The mechanism does not exist to ensure that a person named as a beneficial owner is in fact the beneficial owner.

Change of ownership notification

Notification is required upon change of 25 per cent or more ownership . . . that is theroretical for there is no enforcement.

There is no department or individual responsible for processing the license application.

Confidentiality

Far from being a haven with respect to secrecy, Montserrat is entirely open as respects the language of the confidentiality law. . .

Confidentiality is guaranteed by inefficiency.

Montserrat realities

Major nations have very little understanding of how the very small Caribbbean nations must live . . . the need for self sufficiency by almost any means.

It is very easy for others to be critical, but that criticism would be tempered were foreigners to appreciate the very narrow base of the economy, the very small margins on which the island lives . . . how difficult it is for these resourceless islands to survive.

Eventually no bank with a Montserrat name or location will be credible or trusted around the world. The historical fault lies in the delegation of authority by Her Majesty's Government at the time of independence to the internal legislative process of Montserrat . . . it would have been much wiser (in retrospect) to reserve the responsibility for those international relations in fiscal matters . . . just as respnsibility for defense is vested, in Her Majesty's Government.

This is an island where informal activities predominate.

The U.S. and Her Majesty's Government and Montserrat have a common interest in the economic development of the Caribbean, the provision of adequate banking facilities, and the protection of all concerned from shady banking.

If the U.S. were to make up for lost revenues from banking, there is no question that offshore banking licensing would stop.

One wants to make money and not kill the banking business here. A bank once set up may proceed to operate as it may wish and no one on the island will know what it does.

Small islands are not viable as administrative units. To run the country at all you have to bend all the rules.

The islands of the East Caribbean are at the mercy of exploiters . . . they have always been the stomping ground of freebooters and pirates; that condition still continues.

The state of banking law and its implementation

Montserrat does not have any offshore banking legislation. The entire operation grew up out of the registered companies act . . . as a tax haven legislatively, Montserrat is only a year old (but) in practice it has been a tax haven for some years because the existing legislation was neither interpreted nor enforced for tax collection purposes. Local authorities had no competence to gather taxes beyond the license fee.

Montserrat does have banking legislation, the Ordinance of 1978 as amended.

None of the amendments (to the registered companies act) are being administered as the law provides. There are difficulties in getting documents, resources are not available, one lacks personnel . . . whatever the law, the practice with respect to it may be at best pro forma, and perhaps entirely indifferent.

No one has any idea what banks are engaging in trust business; the best that can be said is that by making it a matter of statute, it will appear that one has tried . . .

We are in despair of the law here ever meaning anything.

Regarding banking law, the whole thing is a shambles.

There is no single banking company in Montserrat that is lawfully constituted.

Companies and banks are out of control; no one knows who they are or what they are.

The following suggestions are proposed:

Local officials would benefit from education via seminars in the nature and risks involved in their current practice of EuroBunco Bank (unregulated, unscreened) licensing.

Since bank licensing fees are essential to a balanced budget, efforts to develop alternative financing sources are in order through further technical assistance to developing industires. Short-term loans to replace bank licensing fees should be considered during the period of what is hoped to be rapid, stable development.

The recommendations of the previous section with respect to an imposed diligence requirement as part of coordinated international banking efforts are applicable.

Information exchange represents no legal problems. Montserrat does lack an adequate legal regime or resources for records keeping or search. Technical assistance, including skilled personnel, is essential to improve capabilities to gather, keep and provide information. These same capabilities will enhance tax gathering capabilities locally, thus contributing incremental increases to government income.

Montserrat police requests to the United States have suffered from response delay to the embarrassment of local authorities. U.S. agency coordination and expedited responses are necessary.

U.S. agency information requests may not be properly formed or routed. Provision of a central mechanism within the U.S. government to provide guidance to police, prosecutors and others making requests is in order so that entirely cooperative Montserrat authorities are not placed in awkward situations.

Montserrat will benefit from the presence of central banking. The same effort to transform ECCA into a central bank will be of assistance here as elsewhere. Were the Foreign and Commonwealth Office to acquiesce in the earlier-made request for an IMF presence, that could only be constructive.

Panama

Panama, a nation with which, because of the Panama Canal, the U.S. has maintained the closest military and political ties, is embarked on a policy of national development with its financial industry as the keystone. Panama already may be the most important Eurobanking center for Latin America. Unlike earlier times when U.S. influence was overwhelming, the majority of Panamanian trade, including banking transactions, is now with others, primarily with Latin America, but, through its Colon Free Trade Zone, is rapidly developing with Asia and Europe. The Colon free zone itself is the second largest free trade zone in the world.

Panama's agricultural industry is declining and it has an expensive labor force and few known natural resources. It cannot, in consequence, expect significant light or heavy industrial growth. At present its financial sector represents 9 per cent of the GNP and has an annual growth rate of 22 per cent, as opposed to the overall national rate of 3.6 per cent. The financial industry directly employs 8,000 people and pays salaries of $60 million per year with, of course, considerable additional indirect support to building, technology and other service industries. The assets of the banking systems are about $38 billion, which places it approximately equal to the Cayman Islands, and, along with the Caymans, second to the Bahamas as an offshore western hemisphere Eurobanking center. Panama has the world's fifth largest registered merchant fleet (an offshore revenue device), and liberal reinsurance laws for its large offshore insurance industry.

Panamanian banks, operate, probably much more so than the Caymans, in the Euromarket. Local banks have instant access to the Eurocurrency market. Eurocurrencies are thus available to the many Latin nations whose banks operate in Panama, and to Panama for local credit at only 1 per cent over the London International Bank Offered Rate. In consequence, Panama is able to support its development through borrowings, a process which has been prudently managed, for, although it has debt, the country seems to have a good international credit standing.

There is social risk in Panama which could effect its future credit and stability. Unemployment, officially reported at 10 per cent, is probably nearer 20 per cent, with another 30 per cent of those working underemployed. Thirty per cent of the population is under age 18; many of these young people have high aspirations and poor job opportunities. Unless Panama is able to create jobs through its developmental programs, it is obviously at risk of poverty and dissatisfaction which can be translated into political action.

There are three activity centers—or power elites—in Panama which are of interest to those concerned with that crime which utilize financial facilities. The description of the three relevant centers of power activity—the banking/business community, the elected government and the military/police—does not imply conflict among them. The staff, in any event, is not prepared to comment on these socio-political dynamics.

The recent and only elected president was a partner in a major reputable law firm which is one of the most active in registering offshore companies. However, during the course of our 1982 work, that elected president was removed by the military and replaced by the vice president without elections, by military appointment. The Attorney General, one spoken of by U.S. officials as sincere and cooperative, though without power to enforce, was removed in July of 1982.

For our purposes, the most important structure is the banking and business community. It dictates banking and company legislation and practice and it has embarked on an ambitious program of expansion aided directly and indirectly by the government and military. This expansion has brought the number of Panamian banks to more than 120, almost all of which are branches of established, legitimate international banks. Panama City itself is booming as Asian, European and U.S. monies flow through Panama for investment in Latin America. In the meantime, goods in transit enter its free zone to be sold and exported by distributorships throughout Latin and Central America.

Special conditions make banking in Panama attractive. One special condition is geography; another is the security afforded by the U.S. military presence and the canal. A third condition is bank secrecy legislation and statutes facilitating secret registered companies. Panamanians see this secrecy as essential in attacting that special capital which Panama's geography and facilities entice, for example, Latin American capital seeking political safety and Euromarket advantage. But Panama, a commercial center between the hemispheres, also attracts criminal capital, for it is astride the Colombian-U.S. drug route—indeed it may be the key Asia-Europe transshipment point. Contraband consists not simply of drugs but also of arms for Central America, flight monies from South America, etc.

The distribution of assets in the banking system reflect Panama's attractions. Foremost in size are foreign corporate accounts; second are the accounts of foreign banks for interbank transactions in the Euromarket; third are funds from foreign national central banks (Latin, Caribbean and Central American, primarily); and least in amount are accounts of private investors.[64] Private accounts, which are usually held by foreigners as local registered company accounts, may also appear unidentified as such in interbank deposits, for it is common, bankers say, for registered companies from other havens, e.g. Bahamas, Caymans, Antigua, to hold their funds in the name of accounts of banks in those jurisdictions on deposit in Panama.[65] Thus, while financial authorities state that only 20 percent of accounts throughout the system are private, the figure may be much larger when the special nature of the Caribbean interbank market is acknowledged.

For three classes of assets secrecy is seen as an absolute necessity for the continued success of Panama. One are the private local registered company accounts; a second are those interbank accounts which, is fact, represent non-bank assets on deposit in Panama; and a third are those personal accounts containing flight capital (recently with the Shah of Iran) which represent the personal holdings of dictators exploiting their own national banks. Secrecy would be of importance to them as well.

The second power center tends to be the elected government—whenever one is sitting. Panama has moved politically from dictatorship to fragile democracy and back to military control. The defunct democratic government did seek simultaneously to accommodate itself to the business elite and to a growing middle class, and to facilitate economic and social growth which would also benefit the poor and employed. Its interest in growth and income were therefore much the same as those of the banking community in encouraging Panama's role as a financial center. The United States, with powerful interests in the security of the Canal, in stability and democracy in otherwise troubled Central America, and in its own important trading position, sought in its diplomatic representation to further its interests in a fashion consonant with those of the elected government. As a matter of stated policy, the U.S. limited its diplomatic dealings to that democratic governmental apparatus, now displaced, to the exclusion of visible ties to the military.

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[64] Interveiw with Rene Diaz, President, Panamanian Bankers Association.

[65] The assets of the offshore banks, e.g., those of Antigua, are guaranteed confidentiality as to ownership by a two (or more) step process—secrecy in both jurisdictions with beneficial ownership unknown in both—while at the same time securing safety in the stable Panamanian system.

A third power elite which, like the first, eclipses the elected government is the National Guard (Guardia Nacional) which perpetuates the older, non-elected military role in government, so typical in Latin America. That military system also dominates the criminal/political equation. Without question U.S. enforcement authorities must deal with the National Guard whenever they seek cooperation in criminal matters.

The National Guard is described as "a family" which "takes care of its own," one which selects its own leadership. It, not the former president or legislature, supervised promotions and the succession. Witnesses in Panama took it as common knowledge that the Guard has ties to, and income from various traffickers in drugs, arms, and other contraband, as well as fugitives, and may further levy "taxes" by way of systematic pilfering of cargo in the free zone.[66] The Guard maintains, one is consistently told, integral ties with local business. "To get anything done here, you have to put a colonel on your payroll." The Guard is said to have close links to Panamanian casino operations.

The Guard, the staff was assured, provides warehousing for narcotics on their way north, assures the release, for bribes received, of drug traffickers arrested, guarantees the non-arrest of offenders wanted elsewhere who have paid a kind of local "safe conduct" fee, supervises the air transport of gold, arms, spies bound to and from North America, Cuba and Central America. The word American residents in Panama use for the Guard leadership is "corrupt," and they insist the Guard leadership is in charge.

Registered companies proliferate in Panama. Just how many there are appears to be unknown even to the government, and the U.S. State Department was unable to ascertain a figure. In any event, anyone wishing to hold discreet monies in Panama must have a registered company. The company can be Bahamian with deposits in Panama, or a Panamanian company with its own account. Without doubt, many companies linked to offshore criminal traffic will hold their funds in company bank deposits in Panama. PSI's own hearings have shown this. Ironically, Panamanian citizens elect otherwise; it is estimated 50 per cent of their holdings are offshore in Europe or the U.S.

A registered company can be available within a few hours for they are held already formed and "on the shelf" at local law firms. An old company can be bought if needed, for instance, to backdate transactions documented abroad. Attorneys form and hold these "vintage" shells. As with good wine, one pays for the age. A registered company in Panama costs less than $1000 to form and about

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[66] Reports are inconsistent; more data is needed. Some American businessmen praise the honesty and cooperativeness of import supervising officials.

$250 annually to maintain. The same Panamanian shell is cheaper in Europe, where the competition is stiffer (from the Isle of Man, Jersey, etc.) and where Panamanian law firms keep offices for the convenience of European company-purchasing clientele. For example, one Panamanian law firm has offices in Athens and in Switzerland and told PSI it grossed $30 million in 1981 on the sale and management of companies.

Late in 1982 there were 126 banks, eight of which are important retail commercial institutions. There are 20 banks in the free zone. Fourteen new banks were formed in 1981, five were formed in 1982, and five more are said to be on the way. Bank licensing procedures for this booming business are now quite strict. Panama had its bad experiences over a decade ago [67] and would have no more insolvent or fraudulent institutions. It prefers now to license only major international banks already headquartered in responsible foreign countries. It will not only reject applications from banks headquartered elsewhere in the Caribbean, but will reject applications from subsidiaries of major international banks if those subsidiaries are in the Caribbean. Panamanian officials told us they know what their haven neighbors are like and, to insure prudent banking in Panama, want no part of them. There is no such thing as a St. Vincent-type brass plate bank in Panama; nor are known U.S. bank brokers trying to sell Panamanian banks. One reason for this is the Panamanian requirement of $250,000 paid in capital. Fifty-five of the present banks are international banks headquartered abroad, many of these operating in the wholesale Eurocurrency market. A number of the newly chartered banks are Japanese.

Despite the sincere intentions to assure only stable, respectable banking, the present system has profound flaws. Foremost is that the central bank authority [68] is denied, by secrecy laws, any right to audit deposits. Stability can only be assessed by the examination of the creditworthiness of loans, not by any accounting tests of bank reports of funds on hand or deposit transactions. A bank management may, therefore, engage in extensive laundering, fraud, looting or kiting assets, the only measure of which would be internal audit by a foreign headquarters (thus the welcome to foreign-governed banks from well regulated nations) or the bad news upon discovery of defalcation or insolvency. Panamanian banking authorities are painfully aware of the risk to that reputation which is so important and prized,[69] but such are the resistances of the banking community itself to any threat to secrecy that the law remains unchanged.

A second flaw is that present standards for licensing appear to represent aspirations born out of newly evolving awareness of risk. But strict licensing requirements have not prevented already licensed banks from criminal involvement. Colombia, for example, is a neighbor with four Panamanian branch banks. Officials hold suspect their Colombian neighbors, given knowledge of the widespread criminally based underground economy there and the advantages of exporting those funds to stable Panama. It is widely assumed that Colombian banks are involved in disapproved Colombian activities and such risks as arise therefrom. But they are not alone. Indeed, a number of foreign-based banks are described as not simply welcoming suitcase currency but being intimately involved with disreputable characters. One eminently respectable local banker said that all of the international banks with only offshore licenses, i.e., not local retail commercial operations, have a questionable reputation.

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[67] In the 1960s there were 252 banks, most of which had been carelessly licensed. Two stunning failures occurred. In 1969 a reform law was passed, the consequence of which was that all but a few were dissolved.

[68] Unlike most central banks, Panama's is not a monetary authority, for the paper currency extant is the U.S. dollar.

[69] For example, two commercial banks are presently offering interest rates on deposit which are not explicable in terms of profitability, given LIBOR Eurocurrency rates. Some bankers are concerned that this kind of competitiveness, uncontrolled by central bank supervision, increases risks.

Suitcase currency acceptance is in itself no proof of improper banking.[70] Panama has no statute which in any way prohibits any institution from accepting foreign currency from any source. Banks set their own standards for vetting, and while it was widely contended by bankers that the rule, "know your depositor," was followed—not for moral reasons but because one does not want to be cheated by fly-by-nights—there were none who argued that at least some bankers "know" and happily deal with depositors with dirty money. After all, it is readily granted that banks compete for Latin American flight capital, which is "black" money fleeing in violation of depositors' homeland currency laws.[71]

Panama is, however, responsible for the absence of any mechanism to police, or allow anyone to police, offshore activities by companies.[72] Present procedures provide that any foreign individual, company or authority which complains or inquires about the activity of a Panamanian offshore company has its inquiry directed to the Ministry of Commerce. The Ministry examines its files to identify the local agent, usually a Panamanian attorney, and communicates to the foreign correspondent that information only. The foreign victim—if he be that—has only one avenue of procedure: he deals as best he can with the agent of notice. Ministry officials agree that they receive many complaints of various frauds perpetrated abroad. But no action is taken unless a case is brought in Panama itself. Panamanian law, judicial authorities state, does not recognize crimes committed abroad as a basis for any action in Panama. It is strict in its territoriality.

Hence, this fundamental feature of law serves as the response to requests for information by foreign governments and their enforcement authorities. There can be no release of information with respect to any crime when the crime has not been committed in Panama. Only crimes committed in Panama can be a cause of action. Thus, not only does the bank secrecy law, but this fundamendal territorial thrust of the criminal law, protect account holders from disclosure or other prosecution. U.S. agencies report only one instances in which a request for banking information led, in fact, to disclosure. That was in the Jonestown Guyana massacre case.[73] In one other case $1 million in drug money was seized for a period, then released when U.S. authorities could not provide a Panamanian nexus. Bank secrecy can be lifted upon a court order, when the crime, or indeed civil dispute, occurs in Panama. Banking officials cited four such instances in the past year. In the meantime, managers or employees, whether Panamanian or foreign, are subject to find and imprisonment for revealing bank information.

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[70] Even though it appears that banks not licensed for retail activities nevertheless accept such currency, i.e., engage in local transactions, one would want further information about the nicety of law in this matter.

[71] Another flaw is not one for which Panama can now be held responsible. Before 1969 a registered company could call itself a bank or trust. An estimated 240 identified as banks were dissolved by reform legislation.

[72] There is no record of the number of offshore companies, not even in the hands of the public registrar of companies, who is supposed to know. The minimum figure proposed to us is 100,000; several bank or ministry officials said "millions," including an official in the Commerce Ministry which maintains the registry. Our own calculations, based on the income and reported registration activities of one reputable law firm, suggest that any one major firm alone can be responsible for thousands of companies.

There are no requirements of any kind to be met by an applicant for a registered company. Nor do application procedures assure that actual owners of companies will be identified. Thus, anonymity is protected not only by secrecy law, but by application procedure. Nor, in Panama, would there be any point of holding attorneys responsible for diligence in assuring the character or conduct of their company clients, for the 3,000 local attorneys themselves are characterized as too often a disreputable lot. Apparently there is no ethical code and no disciplinary procedure. The exceptional attorney, it is said, is one who does not cheat his own client. Thus, we do not expect progress toward an ethical standard. Moreover, Panamanian attorneys can be expected to provide powerful resistance to any suggestion for change in the present profitable status of Panamanian company law. As one outstanding, reputable attorney said, "The bar would fight to the death to keep [company registration law] as it is." And again, "If the U.S. were to seek to pressure the government of Panama . . . to change the present system, it would create an uproar. It would threaten our livelihood. . . . We would be vehemently opposed." And again, from a highly respected pro-U.S. professional, "Any effort to influence our legislation in regard to Panamanian corporations and banking numbered accounts will not only to futile but will create a tremendous burden for the U.S. . . . in Panama."

When one introduces the question of what the U.S. might do to get information about the business aspects of charged or suspected offenders, the initial response can be one of counter accusation. U.S. agencies, one may be told, simply do not know how to ask for information. Yet, pursuing this line, one finds that both of the routes to information are blocked. One route, that procedurally defined, is via the foreign authority's embassy to Panamanian foreign affairs officials, thence to the Attorney General, even if sincere in his wish to cooperate against common crimes, can do nothing if the crime has not taken place in Panama. The other, less formal route is to the National Guard. Foreign enforcement authorities may utilize this procedure; indeed, they may be under directive from the National Guard to rely on it entirely.[74] U.S. enforcement personnel do not characterize the Guard leadership as hostile; rather, it is said to be businesslike in its protection of its own interests.

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[73] There is also no case reported to us where letters rogatory were allowed. Furthermore, Panamanian law does not allow foreign authorities simply to take testimony or gather evidence in Panama on their own.

[74] The directives appear to be contrary to Panamanian procedures by which the Attorney General is authorized to evaluate foreign requests. The informal power of the Guardia Nacional in exercising its prerogatives is evident here. Whatever the official stance, the U.S. embassy and U.S. enforcement agencies appear to be responsible to the informal rules of the National Guard.

The Guard will, from time to time show its good will by providing assistance to foreign authorities, as for example "informal extradition" when a fugitive who had not paid his local dues is simply picked up and placed on an outward bound plane. And by agreement, U.S. Coast Guard in hot pursuit may, after a call on a 24-hour alert line to Panama, board a Panamanian vessel suspected of carrying drug cargo. It is formal cooperation of this welcome sort which makes some embassy officials hopeful of further negotiated gains.

Within Panama itself there is no tendency to be sensitive to American concerns, absent dramatic proof by the U.S. that criminals' use of financial facilities is rampant. The Caribbean Basin Initiative is seen by many as inconsequential; Panamanians, while always in need of aid and investment, will not accept the strings. Threats, such as those in the IRS Gordon report, are shrugged off as bombast.

The U.S. is important to Panama. There are close historical ties, but U.S. interest do not dominate perceived Panamanian ones. Panama will no doubt go its own way unless the State Department does succeed in its long haul effort to persuade Panama to put in place a variety of treaty instruments with Panama slowly coming to realize that international cooperation and opposition to common crime are in the enlightened national interest. In the meantime, unless some creative interventions can be conceived, Panama will remain what one astute and economically sophisticated observer said of it: "This may be the best haven in the world."

In summary, Panama presents a difficult problem for diligence requirements recommended elsewhere in this study. Diligence could only be imposed by vetting requirements levied on banks which would require disclosure of company accounts held through offshore interbank deposits. This is not feasible.

Likewise, for Panamanian company accounts to be vetted where investments are managed through local attorneys or brokers, or via offshore trust administrators, would require banks to go behind the nominee as in Swiss independent audits. Given that local law provides no coercion with respect to disclosure and only protection for offshore criminal beneficial holders, that is also not feasible.

There are no solutions, only possibilities. One is to test Panamanian conspiracy charges by using well placed and well paid competent local law firms to encourage the Attorney General's office to bring conspiracy charges against local residents knowingly assisting offenders. Local lawyers also believe the conspiracy charge can be used to persuade the Attorney General to freeze drug traffickers' accounts. Even if followed, this idea is no panacea. Another possibility is strong U.S. lobbying with banking authorities, designed to influence local bankers to reject drug traffic funds. Yet another step suggested, much more far fetched, is to seek to arouse a Panamanian perception of self-interest in altering its law with respect to non-disclosure. Given circumstances present, this is exceedingly unlikely.

The United States faces unhappy alternatives. One is to acquiesce in the present status of Panama as one of the world's best havens. That involves the recognition that, as pressures elsewhere in the Caribbean lead to the exclusion of criminal funds, they will fly to Panama. It is not unreasonable to predict that, given reasonable efforts elsewhere, in 10 years much of the European and Western world's criminal money will reside in Panama.

Perhaps the best alternative is the middle course now pursued by the State Department. Encouragement is given to a democratic system for short-term advantage. Many Panamanians in banking claim that there is no evidence of criminal exploitation of the banking/company facilities. As alluded to above, the United States must devote intensive efforts to investigation and documentation of all cases where a Panamanian connection is suspected. Informal meetings held with civic, business and military leaders wherein is expressed the gravity with which U.S. citizens and authorities view the detrimental Panamanian role could also be useful. In tandem with this the State Department continues to press for reciprocal tax treaties and other agreements in hopes of conditioning the Panamanians one step at a time.

Switzerland

Switzerland is highly important to the Eurocurrency market. With less than 0.03 percent of the world's population, it is the world's leading market for gold and re-insurance. It is the world's third largest financial power. At the end of 1977, identified foreign deposits on hand in Switzerland were about $50 billion.[75]

In 1980 fiducuary transactions amounted to almost 121 billion Swiss francs (then about $75 billion). The Swiss stock market was, in 1980, capitalized at 60 billion Sw. Fr., the bond market at around 80 billion Sw. Fr.—(at an average 9 per cent return this would represent assets of about 90 billion).[76] Our earlier 1977 estimate of fiduciary accounts (investments or trust) held in Switzerland of $170 billion might well be too high, although given commodities holdings—gold in particular—by no means impossible. Thus Gordon's 1981 proposal of up to $85 billion seems conservative. Assuming no flight of capital, and estimating for weakness of the Sw. Fr., a 1982 estimate would surely allow fiduciary holdings easily over $100 billion. Gordon proposes a range of $80 billion to $85 billion for 1978. An average $50 billion in bonds are assumed held by Swiss "securities/advisory" accounts. Assets in 1982, prorated for Euromarket growth, would be estimated at about one half billion dollars. A large proportion of the money flowing into Switzerland comes from other havens. This is referred to—and may serve legitimate tax minimization or legitimate concealment purposes—as "layering." A limited calculation by Professors Blum and Kaplan indicates that about two-fifths of all Swiss banking transactions (the UK excluded) are with or via havens. If London, the major offshore financial center, is included, then more than half of all Swiss transactions are within the less regulated Eurocurrency market.

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[75] P. deWek, "LaSuisse et les Capitaus etrangers." Paper presented at the General Assembly of Swiss Banks and Holding Companies, Zurich, November 2, 1979.

[76] G. Cuendet. Personal communication with PSI consultant.

Whether Switzerland is a consequential laundry or investment depository for criminal funds is a matter of debate. That it is the sanctuary of flight capital in violation of other nations' currency laws is not argued, and it is certainly an important residence for monies enjoying tax minimization. Nevertheless, as with all major Eurobanking centers, the primary sources of Eurocurrencies will be derived from industrial, interbank, foreign national bank, and semi-governmental agency borrowing and lending activities.

The Swiss, like financial authorities in London or Singapore, designate themselves as a financial center rather than a tax haven per se. Fully 3 percent of its work force is in banking. Certainly Switzerland's haven characteristics are limited. Switzerland does not charter offshore Swiss companies. Swiss registered companies pay taxes on income and must have local directors. There are current proposals to tax fiduciary (trust) accounts administered in Switzerland at a rate of 5 percent withheld at the source. There were, in 1980, 4887 banks (including branches serving 3000 towns), trusts, and other "financial institutions" in Switzerland; there were only 557 headquarters institutions. Furthermore, Switzerland levies the highest withholding tax on dividends and interest of any nation—a flat rate of 35 percent [77] on all revenues on shares and bonds issued by Swiss companies, and in fiduciary deposits made in Switzerland. Swiss licensing procedures are strict, and the country's chartered banks operating abroad do so under the controls of Swiss federal authorities: the National Bank and the Banking Commission.

Switzerland does have a bank secrecy law which applies the criminal sanction. On the other hand, it has a Treaty of Mutual Assistance in Criminal Matters [78] with the United States which routinely allows bank secrecy to be lifted when there is probable cause shown for common crime or, in cases involving organized crime, tax offense. A new law (International Mutual Assistance in Criminal Matters, "IMAC") came into force January 1, 1983. It will extend to all nations the same information provision and investigation rights as exist under the U.S.-Swiss Treaty. Foreign prosecutors will have the same powers in Switzerland as do Swiss prosecutors who will work on their behalf. IMAC also contains a broadened application to tax affairs, although tax "evasion" as defined in the U.S. is not a criminal matter in Switzerland and, consequently, tax cases which do not involve fraud do not fall under provision-of-information procedures. IMAC assistance will be available for tax fraud without respect to any organized criminal involvement.

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[77] In 1982 Cayman imposed its first requirement on dividends and interest at a rate, for 1983, of 10 percent.

[78] Frei (1981) has reviewed the Treaty, beginning with the first U.S.-Swiss accord of 1850. Frei considers the reconciliation of English common and civil law a remarkable achievement. Frei (1982a), in a note, shows how the development of international agreements in consonant with the growth of conventions among the European nations in response to the need for international coordination in combatting crime. By 1982 there had been 131 U.S. and 41 Swiss requests for judicial assistance, and 6 U.S. and 2 Swiss extradition requests. Most requests under the treaty have been for bank or business information relevant to charges of white collar crime. In 80 per cent of the cases convictions or guilty pleas have been forthcoming after Swiss records secrecy was lifted; in Switzerland, convictions were obtained in 90 per cent of the cases. An outstanding case is that of Frank Sindona which Zurich and Geneva bank records proved critical in prosecution for his role in the Franklin Bank collapse. The 25-year sentence Sindona received was one of the most severe ever accorded by a federal court in such a case.

Switzerland, with the Group of Ten and now Canada, has been active in furthering the extension of national and headquarter supervision of overseas branch bank activities under the auspices of the Bank of International Settlements located in Basle. Switzerland also enjoys an important and unusual Convention on Diligence—revised July 1982, effective November 1982—which is supervised by the Commission Arbitrale—the executive secretary of which is an executive of the National Bank. The Convention requires that bankers be held responsible for the proper identification of all new depositors, including those creating fiduciary accounts, and for assuring that funds do not have criminal origins. Immigration of tax evading monies, when associated with fraudulent documentation, are considered criminal under the diligence conventions, but capital in flight from currency controls abroad is not so considered. Swiss citizens, however, are liable under the criminal law if they facilitate the flight of currency violation capital. Bankers resisted the diligence requirement through lobbying, but federal authorities expect to expand diligence obligations.

Under Article 3 of the Swiss banking code, it is unlawful for a Swiss banker anywhere knowingly to do business with anyone but persons of good character. The sanction also applies to Swiss working abroad. By this device Swiss authorities strive to maintain, via federal bank supervision of overseas branches, the honest use of Swiss banks.

There is a large loophole in the Convention on Diligence of which federal banking and prosecutorial authorities are aware, and which they are seeking to alter. An attorney or certified auditor (CPA equivalent) of a professional notary may represent to a bank that his client is known to him and that the funds being deposited by the professional who enjoys privilege under the law, as nominee, are not of criminal origin. The codes of conduct for attorneys differ from canton to canton, a matter which presents problems to federal authorities in enforcing diligence. The majority of Swiss attorneys are considered ethical—the estimate is that no more than 2 per cent are not—and it is argued that liability for criminal conspiracy is a strong deterrent to an attorney, banker or trust supervisor, in working with criminals. Federal police authorities, themselves notably strict and competent, are of the opinion that current Swiss law has in fact made Switzerland a *patria non grata* for criminal monies.

Swiss federal bank authorities have been working with the Council of Europe to extend certain of the diligence requirements throughout Europe. A committee of that Council remommended a provison which was accepted (June 27, 1980) requiring all banks in nation members of the Council to exercise limited diligence. Identity checks are to be made on customers any time a current (checking) or deposit (savings, investment) account is opened, or when safe deposit boxes are rented, when cash transactions of magnitude are effected, or when interbank transfers of magnitude are conducted. We have not ascertained if there is a standard of "magnitude". One banker states that his institution considers diligence applicable only for amounts over $25,000. The deficiency here again is that lawyer, accountant, or other professional nominees may open accounts on behalf of undientified clients upon their vouching that funds are clean. Safety deposit boxes may also be opened by agents who are not beneificial lessors, but diligence desolves upon the renting professional acting for another.

The staff has inteviewed federal bank officials, private bankers and attorneys who are in agreement with the Swiss police that Switzerland neither wants nor is likely to have on hand significant amounts of criminal money, excluding the aforementioned flight capital and tax evading funds. Recent developments, e.g., regulation—the U.S.-Swiss Treaty of 1977 and the insiders trading agreement of 1982, support that claim. U.S. negotiators report that the initiative for the Treaty was itself Swiss, a sequence described as the Swiss response in the 1960s to "needling" by a U.S. prosecutor in Manhattan, Robert Morgenthau.

Both U.S. and Swiss officials express satisfaction with the Mutual Assistance Treaty, although Swiss police and prosecutors say they are surprised that the U.S. does not make more requests under the treaty which, they say, can be triggered by a lower threshold of evidence for probable cause under Swiss standards than applies in the U.S. Under IMAC, requests for information from the U.S. or any foreign authority may be made directly from the Ministry of Justice of the registering nation to the Federal Office for Police Matters, bypassing the cumbersome diplomatic channels.

In their own requests to the U.S. the Swiss express dissatisfaction with present U.S.-Interpol arrangements which are by committee. They would perfer to deal with one continuing authority to avoid present delays and inefficiencies attributed to U.S. interagency communication and policy coordination inadequacies. (We note this complaint is virtually universal.) Swiss banking authorities, on their requests for bank license applicant data from the U.S., voice no complaints although affirming they relay on efficient informal ties to U.S. bank authorities rather than on official channels.

There is one form of U.S. violation in which Swiss banks have been involved, and where U.S. court decisions have been forthcoming. This is insider trading. Recent SEC cases involving Swiss banks acting to conceal insider stock market trading have had major reprecussions in Switzerland where until now, no law obtains with respect to insider trading. In response to this abuse, and Swiss federal authorties concur that it is an abuse, legislation has been drafted for introduction in Parliament to outlaw any person (Swiss or other) from acting on behalf of insiders. Until Swiss legislation takes effect, Swiss banks have thenselves joined in an agreement to prevent any Swiss bank role in insider trading in the U.S. After heavy pressure from the SEC and the Department of Justice, an agreement has been reached whereby Swiss banks will provide to the SEC names and details of transactions executed in U.S. markets for use in SEC investigations. Profits derived from such transactions will be blocked voluntarily by Swiss banks. Should a customer informed of an SEC request resist exposure, he may submit evidence to a Commission of the Bankers' Association, which proceedings will enjoy secrecy. Should the Commission find that insider trading has occurred, requested data will be forwarded to the Federal Office for Police Matters for transmission to the SEC. In the event the Commission doubts the accuracy of data submitted by the bank in question, it will ask for further investigation by the Swiss Federal Banking Commission. Unfortunately, one of the first reports under the new agreement was rejected by the Swiss Court.[79]

Swiss banks have been caught in egregious management fraud, from currency and commodities scams to theft of foreigners' deposits. The most dramatic case involved the Credit Suisse Chicasso branch misappropriating funds illegally crossing over from Italy. Estimates of that loss vary. Some go as high as $1 billion.

Human inventive capacity is unparalleled. Thus, there were innovative reactions when, in the service of monitoring the U.S.-Swiss Treaty, the National Bank placed at least some banks' accounts on a computer. Tax authorities in another nation then managed to bribe computer operators to identify some of their nationals suspected to tax evasion through secret accounts. The banks responded with a counter protective measure as follows: Bank A buys the use of a block of numbered accounts from Bank B. A nominee attorney (or banker, or other), C, representing individual or corporation D, negotiates with Bank A for the use of a numbered account. Bank A gives attorney C power of attorney over its own numbered account, X, in that block of accounts held in Bank B. No record is made except that one officer in the bank, using his banker's discretion, has a copy of that power of attorney. The federal computer will know that account X is owned by Bank B; it may learn that Bank A has the use of that account. It will not learn about nominee C or beneficial owner D.

Variations allow the beneficial owner to be hidden behind offshore companies, for although Switzerland registers no such companies as Swiss, Swiss attorneys are able to purchase companies in Liechtenstein, Panama, the Channel Islands, the Caymans, Liberia, and elsewhere, without leaving their offices. They can buy a Caribbean bank without leaving Zurich. A young lawyer who does not know the ropes can purchase any number of havens establishments by mail simply by responding to advertisements in the Herald Tribune. Certainly Swiss lawyers are as adept as any in "layering" secrecy through complex arrangements of haven nominee companies and accounts. The Subcommittee's consultant described one such model scenario is his report and, during a visit to New York, a commodity fraud defendant outlined in vivid detail a fake commodity tax shelter run through Swiss and Lichtenstein facilities.

Professionals, operating within this smooth system estimate that, for all the variety of haven purposes which may be pursued through the Lichtenstein connection of 50,000 establishments, probably no more than 10 per cent of the establishments are hiding criminal monies. That would be about 5,000!

The general view among knowledgeable Swiss is that few U.S citizens utilize the complex laundering procedures available. Most describe Americans as naive about international banking, uncomfortable anywhere where English is not the native tongue, unacceptable as new clients unless well introduced to Swiss bankers or lawyers.

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[79] See Wall Street Journal, February 4, 1983, regarding *Santa Fe* Case.

Knowledgeable Swiss sense that Switzerland, because of its rapid movement to reduce incentives and possibilities for its use as a criminal money have, has compelled such monies to go elsewhere. Corporate fraud managers and high-rolling financiers are said to bank in the cleverest center of all, the City of London itself. The Bahamas [80] are most often noted as the suspected domicile of less sophisticated money, "dirty collar rather than white"; some Swiss describe Liberia as the paradise for offshore corporate subsidiary company formation.

Swiss authorities are considering new steps to assure the underlying principles of diligence. Under consideration is a proposal for legislation which would prohibit the deposit or fiduciary account administration of any non-governmental monies from countries classified by the World Bank as among the poorest. That proposal is in recognition of the problem posed when desperately needed local monies as private wealth are siphoned abroad rather than being available for national development. The Swiss are aware that blocking this entry into Switzerland would mean that the funds would go elsewhere; however, it is the position of many of those with whom we spoke that Switzerland must enunciate and implement a moral position even if it is not shared by, and works to the financial advantage of, other (haven) countires.

At issue here are several powerful concerns. One is the present Swiss practice of receiving capital flight money from whatever source. Individuals associated with banking, i.e., those profiting, argue that Switzerland must serve its traditional role of being a haven which provides security for citizens of other countries who are afraid of, in danger in, or otherwise oppressed by their homeland. If an African country, for example Uganda under Idi Amin, generated chronic terror through a thousand daily savageries, should Switzerland deny a welcome to fleeing refugee funds?

Some who we inteviewed referenced a strong thrust in Swiss political thought which views any modern states as the enemy, current or potential, of its citizens. The typical democratic welfare state, many Swiss argue, pits itself against its productive citizens, eroding their wealth and exploiting their labor through economic and social wealth transfer policies which provide disincentives to individuals who learn to enjoy the fruits of welfare rather than their own labor.

It is not surprising that the investigator continually encounters the philosophy, "if we don't do it, they will." This was encountered in London as an excuse for doing nothing by way of enforcement collaboration against offshore crime. It was also seen throughout the Caribbean where, it is contended, were any haven restrictively to alter its banking system, capital would move elsewhere. A similar agreement is found in official banking circles when regulation is proposed to combat the economic risks believed to underlie the Eurocurrency market itself (e.g., risks to national monetary policy, risk of inflation). Unless all regulate, the competitive benefit is to those who do not.

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[80] A senior central bank official in the Bahamas stated that changes in Switzerland were driving the careful money to the Bahamas, a situation which, he said, was very pleasing to him.

Contrary to the voice of Swiss government officials who state that national policy must be moral, one encounters Swiss bankers who, like their counterparts in Antigua or Panama, insist that it is but stupidity to forego profits since that money will go elsewhere. A somewhat modified version of that argument is that there is no objection to being moral, since no one needs or wants dirty money, but once reform begins, where will it stop? Would all flight capital be the next to be banned? Would Switzerland respond to foreign pressures on tax monies too?

There is reason to worry, they say, for IMAC now expands the definition of tax violation to include duty fraud. The U.S., when it is requesting tax-related information appears to be able to opt for a route of choice: the existing U.S.-Swiss tax treaty, the Criminal Mutual Assistance Treatry, or the new IMAC. Swiss tax and banking professionals worry that a foreign authority opting for criminal mutual assistance will put in the hands of the Swiss police and judiciary discretion with regard to provision of information.

> There will be lack of competence . . . [the police and courts] do not understand the system, and may define an offense when there is none. The idea of dealing with the police is unsettling . . . we are not happy with the new law . . . mutual tax treaties are to be preferred. Information requests under the latter go to the Swiss Federal Tax Administration . . . Swiss business trusts them.

As in Bermuda, there is tension between the business community and the police when it comes to who shall decide what banking information is to be provided to foreign authorities.

There is another area of disagreement. It is not internal but rather a matter of contrasting national regulatory philosophies. We heard concern expressed over new U.S. judicial decisions which are imposing on the foreign headquarters banks of any bank with a branch in the U.S. certain obligations for that international bank as a whole. Thus, general U.S. philosophy of host country control over foreign branch/subsidiary banking is gradually being extended by court decision. The Bank of International Settlements' Committee on Banking Regulations the Supervisory Practices stresses adequate host country supervision, but "the adoption of the principle that banks' international business should be monitored by parent authorities. . . ."

While the Swiss do not argue against all host regulation, they insist that responsibility for soundness best rests with home countries' own banking authorities.

The disagreement is not inconsequential, for when degrees of strictness of regulations differ, as they do, both sovereignty and competitiveness are at stake. The more lax home country is likely to sense intrusions on its policy sovereignty, including bank secrecy if that is at issue, by a more strict host nation.[81]

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[81] As a corollary there is the practical awareness that when banks from different countries operate in relatively unregulated haven jurisdiction, competitive profitability is influenced by

Continued

Closely related is one definition of an issue at law in a continuing series of U.S. cases involving Swiss, Canadian, and UK banks: can U.S. authorities rightly demand, because a U.S. based branch operation is involved, access to data held abroad under the provisions of headquarter bank country secrecy? And if it does, if the court requires disclosure whereas homeland law prohibits it under a criminal sanction, what is the official on the spot to do? In a recent SEC case (St. Joe Minerals), the former prosecutor to the Swiss Confederation testified on behalf of the SEC that the Swiss law of "necessity" protected the banker from Swiss prosecution for secrecy violation. "Necessity" is defined as disclosure forced by threat of major loss or punishment by foreign authorities. The present prosecutor holds that "necessity" is not compelling in such cases. A new text on Swiss banking law also would disagree with the former prosecutor's interpretations.[82]

The same host versus home issue emerges in examining the dilemma arising for offshore banking personnel compelled to testify in the U.S. as to financial data under their offshore management and covered by secrecy statutes. In a kind of war in which the 1976 opening gun was fired at a Cayman banker in *United States* v. *Field,* the U.S. has sought to force disclosure, while havens such as the Caymans, Bahamas and Panama—and non-haven France—have escalated the criminal sanction to prevent disclosure. The threat of arrest looms over offshore bankers touching U.S. soil. Indeed, in April 1982 a Cayman bank manager for Barclays was arrested in Florida as a material witness for a later scheduled trial. The issue: whether a case in New York involving a Swiss bank or a German airline or a Cayman bankers or a Bahamanian cabinet official, is a contest of interests, ideology, law and power. It is a tug-of-war between an offshore criminal sanction and a U.S. civil or criminal one. The prize is continued confidentiality, sovereign rights and money. The rope being tugged is the body of a witness or the assets of a firm.

Not all conflict with Switzerland arises from U.S. pressures for disclosure or criminal penalties against a local defense. Swiss policy officials, for example, are critical of the U.S. for inaction not only for failing to invoke the treaty more often, but for failing to apply forfeiture to criminal proceeds when the opportunity arises. The Swiss claim that it was the American negotiators who did not allow a forfeiture provision in the Treaty. In the meantime, Switzerland claims it engages in such seizures unilaterally, as for example, on the strength of a DEA telex. In the meantime the Swiss benefit by the Treaty since illegal money seized in Swiss accounts reverts to that government—not the U.S. A $5 million case is now in the Swiss courts and Department of Justice officials have assisted in collecting evidence to link the money to drug violations.

Extradition with the U.S. is also a problem for the Swiss. On request from a foreign authority, Swiss officials—the quasi judicial

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the degree of severity of home controls. For example, were the Swiss to impose reserve requirements on all their overseas branches, those branches would be less profitable (other things equal) than competitive branches in other jurisdictions.

[82] See M. Aubert, J. P. Kernen and H. Schonle, "La Secret Bancaire Suisse." Bern. Staempli, 1982. See also P. Logoz, Commentaire du code penal. Partie Generale Nuechatet, Delachauz and Niestle, 10th edition, undated.

Federal Office for Police Matter—require simply notification—a copy of a warrant of arrest or the sentence—but no evidence as such. U.S. authorities, they complain, require so much evidence that "It seems to us we are trying the fugitive first in the U.S. and then later here." They ask if the U.S. requires such evidence between states on extradition matters. "If we don't trust each other, what is the purpose of the extradition treaty?" They acknowledge one problem: Switzerland does not extradite its own citizens for their crimes committed abroad. It charges them in the homeland. Because of the consequent reciprocal breakdown in U.S.-Swiss extradition, a U.S. citizen who came to Switzerland after he murdered his wife, was not extradited. In the words of one police official, "Why, the way extradition is not working, we could have special tour groups for American murderers coming safely to stay here."

It is apparent that procedures in matters of retrieval of offshore financial data, offshore assets, or offshore fugitives, are all areas in need of international agreements. Requests, investigation, gathering of evidence, freezing and forfeiture, return of assets, provision of data, extradition, where sentence is served, are all facets of the interlocking enforcement concern. They should not be treated in isolation. It is the business of treaty negotiators to consider them as a fabric. Policymakers, like those in the Department of Justice, concerned with offshore business-type crime do well to recognize the diverse interlinked elements and fortunately recent developments in the Department indicate such an awareness.

Summary

In contrast to Panama, suggestions which arise from observations in and about Switzerland are far more optimistic. Cooperation exists; it merely must be applied on a larger scale. In addition, authorities may wish to:

Expand the Swiss concept of diligence, including its test on bank audit to go behind nominees to all banks through regional (as in EEC) agreements or multinational treaties.

Expand the concepts embodied in the U.S.-Swiss treaty to form a whole network of treaties.[83] Encourage nations to adopt the unilateral IMAC-Swiss concept where essentially a national prosecutor acts for any foreign prosecutor, which does not exclude foreign investigation, and where information is exchanged and evidence is obtained abroad.

As discussed before and recommended by Swiss Authorities, move to develop international standards for such examination and exchange of information among banking authorities exempt from secrecy restraints. This is in support of current BIS efforts.

Revise the U.S.-Swiss Treaty to include provisions for freezing, forfeiture and return to victims of all types of assets which are the fruits of crime.

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[83] The U.S. negotiating mutual assistance treaties in criminal matters with Turkey, the Netherlands, Italy, France and Germany. The Colombian treaty, now in final form and awaiting ratification, allows for assistance in one country for violation of laws in another which are not acts criminal in both.

Renegotiate troublesome clauses in the U.S.-Swiss Extradition Treaty which allow U.S. offenders to avoid Swiss extradition.

Consider how to extend the equivalent of Swiss Banking Code Article 3, which makes bankers responsible for doing business only with persons of good repute. Multilateral agreements are necessary when transactions are trinational, i.e. a Caymans supervisor cannot now assess the originator of a transaction booked from Panama through London, since he has no access to originators either in Panama or London.

Notification agreements should be put in place. Under present mechanisms and treaties, there is no provision for notification when a country discovers, or suspects, activities in its own territory which may be in violation of banking regulations of another country. For example, Swiss authorities learned of sale of assets of a foreign bank by a Swiss bank with subsequent resale to the foreign bank. Clearly this was done to evade the intent of foreign national reporting requirements. Without notification procedures, by agreement or treaty, such alerting information is lost.

Civil and criminal options to trigger assistance: The SEC, by opting to act civilly rather than through DOJ criminal prosecution, may exclude itself from data available under the U.S.-Swiss Treaty or IMAC. Negotiations toward the inclusion of such civil actions, when they are options with a parallel, unexcluded criminal option, are to be considered.[84] The effect would be to embrace much more management fraud within mutual assistance treaties.

The Cayman Islands

From the standpoint of criminal uses, the Cayman Islands represent a critically important jurisdiction. Many Department of Justice officials consider it the primary haven for U.S. criminals moving money offshore.

A reading of the Cayman law shows that provisions do exist, on application, for information to be provided in criminal matters. Furthermore, Cayman authorities occasionally indicate a desire for proper relations with the U.S. and other countries in matters of information exchange, and investigations which are not "fishing expeditions." Whatever the status of current negotiations, and there has been a series of meetings, some quite recent, U.S. officials consider the Caymanians fundamentally uncooperative. Given present political realities on the Islands, they are deemed incapable of effective cooperation, since public pressure tends to influence decisions of the all-important Executive Council which decides on information requests.

Under the conditions of tension in the Caymans, that is forces for and against cooperation with the U.S., an informal agreement might be preferred, one not publicly polarizing Cayman internal dissent or jeopardizing in a showdown the position of pro-cooperation groups. One problem with such a solution is inevitable U.S. pessimism which has been generated over the years. Caymanian resistance to American efforts—even where proper procedures are followed—has been substantial. A recent Jamaican High Court decision has created an important precedent in the Caymans, however, insofar as disclosure of records and depositions are concerned. This decision overruled a lower Cayman court and required a Cayman bank to disclose its records for a U.S. criminal case *(U.S. v. Joseph LeMire, at al.)*. The Kingston court emphasized that it was not the intention of Cayman confidentiality statutes to shield criminals.[85]

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[84] In a recent Swiss case, the Swiss Supreme Court held that the Treaty applies to an SEC fraud investigation, provided that the Department of Justice has made a request, and that the conduct may be (i.e., under the prosecutor's option) subject to criminal proceedings.

While during the present period of reconsideration as well as conflict there are understandable calls for patience and delicacy, both in the Caymans and the U.S., one must not disregard the U.S. enforcement temper. One IRS official estimates $3 billion criminal and $3 billion tax-evading monies annually flowing there; one Justice official estimated up to $10 billion illicitly flowing there annually. Such figures are unsubstantiated, but it is argued by some U.S. officials that severe sanctions can be applied with minimal costs either to Caymanians or to regional security. And, many believe losses are high enough to justify strong reactions. Thus, it is hoped that Cayman authorities will see the near crisis nature of the present situation, where delay may in fact lead to sanctions.

Other havens

Numerous jurisdictions have not been examined here. If we were to focus on those characterized by Gordon and his group in 1981 as tax havens, the study would have to include the Netherlands Antilles, Bahrain, Hong Kong, Luxembourg, and the U.K. including the Channel Islands. Also deserving attention would be Liechtenstein, St. Vincent, and Liberia. Pacific island developments, for example Nauru and the Marianas, must also be monitored.

Each country analysis would have to take into account special conditions and the approach to negotiations, with strategies adapted to these local situations.

VI. MONEY LAUNDERING: PRIME COMPONENTS

Banks

In terms of amounts of money exported, the single most important element is a bank. It is a bank which ordinarily accepts money for export and transmits it abroad through a clearing house. That is done primarily by wire transfer, or by drafts drawn upon the bank. Banks may also transfer credit.

The role of the bank as prime launderer may be changing. Given enforcement programs such as those widely publicized in Florida (Operations Banco, Black Tuna, Bancoshares, and Greenback), given the expanding indictments of bank personnel and, now, of banks *qua* institutions, bankers see the costs of bank laundering rising, particularly in Florida. In November 1982, President Reagan announced a program to expand drug interception and prosecution operations geographically; these are supposed to include financial areas. In the meantime, the bank is also the institution subject to legally-imposed currency reporting requirements.

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[85] See Wall Street Journal, January 11, 1983. See also discussion infra at pp. 224–225.

But while most U.S. bankers do not cooperate willfully in laundering money, there is a continuing perception among law enforcement personnel that even large domestic banks prefer to close their eyes to the source of their deposits and thus accept dirty money.

Federal prosecution of banks (Palm State Bank in Palm Harbor, Florida, Garfield Bank in Southern California, Great American Bank of Dade County, Florida) have reminded bankers of their duties. A current $97 million criminal case against Great American Bank of Dade County should also attract bankers' attention. The General Accounting Office (GAO) has, in turn, reminded the Treasury and IRS of their duties to examine the currency transaction reports (CTRs) sent to them. A series of GAO reports, the most recent in 1981[86] have been critical of these agencies' performance. The GAO suggests amended legislation; key Treasury officials point to the value of CTRs in Florida and other narcotics/bank prosecutions; [87] bankers are likely to say the GAO reports prove banks are needlessly burdened with costly paperwork.

The intention on the part of U.S. banks to resist participation in laundering is not challenged, although cases do arise when dishonest employees or bankers have conspired with criminals in laundering. In such cases there can be no hope for normal personal or social controls, prosecution has rested on successfully detecting evasion of reporting requirements. They may arise from criminal investigations which lead to a bank, as well as from observed discrepancies in reporting itself.

Bankers' discretion and powers of attorney: An area for bankers' self improvement

Are there areas amenable to further internal control by honest banks? There are. They bear on those activities related to "bankers' discretion." Major banks tolerate, indeed may encourage, informal rule-bending to service important clients. These occur in a context of an enduring relationship between a bank officer and a client. (Excluded in this discussion are those conspiratorial relationships in which a client pays bank staff for laundering.) We have seen that discretionary services may include: allowing clients with unverified identities to make deposits, allowing clients whose funds are not of foreign origin to make such investments, acting without power of attorney to allow clients to manage investments, or to transmit funds, on behalf of foreign registered companies, or local companies themselves acting as laundries. Discretion also is involved in the failure to file tax information returns on overseas earnings and uncritical—although hardly justifiable—participation in sequential transactions just under the Treasury reporting thresholds, as for example, high four figure transmissions, e.g., between $5,000 and $9,999 in one day or, alternatively, the same client transmitting in four registered company names—again without power of attorney—$9,999 each at the same time.

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[86] Report to the Congress by the Comptroller General: Bank Secrecy Act Reporting Requirements Have Not Yet Met Expections, Suggesting Need for Amendment, No. GGD–81–80, July 23, 1981.

[87] The Florida operations began in 1977 when an alert Treasury enforcement official (Robert Stankey) observed that CTRs were showing large deposits (up to ($800,000 at a time) by Colombians describing themselves as engaged in "export-import" or "agriculture". Simultaneously it was observed that the Federal Reserve was reporting receipt of surplus currencies from its Florida district, in that year an inexplicable $1.5 billion. CTRs suggesting drug transactions in the amount of $200 million were identified. In the two years of operation (Greenback), beginning 1980, over 100 Florida indictments have been handed down.

With regard to wire transfers, which are far more important in terms of amounts exported, there are and probably can be no reporting requirements. Volume is too great. (Records of instructions and transfers over $10,000 are required to be kept for inspection.) Sophisticated and consistent funds exporters will do so through corporate accounts and via wire transfers. Banker discretion here operates to allow telephone transfers without written authorization, to allow recall of foreign funds deposited, funds without "error" destination recording on statement rendered, and to respond to transmittal order without power of attorney or other authorization for individuals who wish to avoid recorded association with a transfer.

As a discretionary service, bank officers, with wire transfer orders, will agree to enter on their records false foreign account number destinations. They may also assist in fraudulent identification of source orders by not recording the actual source, and, by "being away from their desk," arrange that another officer who has not received the wire transfer order signs it as received. This circumvents follow-up on "errors" in address recording. Such errors are, in any event, not at all uncommon in wire transfer departments. No doubt there are dozens of other discretionary services. We have not made the on-the-spot observations necessary to catalogue these.

Improving banks' diligence

What about the rules banks set for knowing new customers, i.e., diligence as practiced by the Swiss? Informal inquiry among local banks suggests a wide range of procedures, some of which are already optional bank policies. Commercial corporations and foundations are routinely required, when opening an account, to submit state proofs of incorporation or tax-exempt status. All clients are asked for taxpayer identification numbers. The bank relies on state authorities for "diligence" in this matter of incorporation. Laxity in vetting can occur when the company is an offshore one. No power of attorney may be required, and a proof of registerty can be sufficient when it is the foreign attorney founder's notification. In this fashion U.S. banks all to often accept nominee applications for deposits, for both offshore and local registered/incorporated entities.

New deposits by companies are also occasionally subject to self-imposed rules by banks with respect to vetting or screening. Typically a bank will require a city license, state sales tax permit, or newspaper legal announcement when doing business with a company. Such requirements cannot, of course, assist the bank in identifying legitimate enterprises used for laundering.[88]

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[88] When individuals apply for accounts, requirements vary, including those federal imposed, e.g., a Social Security number request. However, the policing of depositor identification, or the inquiries made as to the origins of deposited funds are option for the banking companies.

For out-of-state depositors prudent banks can follow the same practice that some careful, reputable offshore banks employ with strangers: funds are accepted and held in safe-keeping but no regular account is opened until a credit check is forthcoming. Offshore, a reputable bank may make inquiries of the Comptroller of the Currency, request of the U.S. Federal Reserve a check on the banknote numbers of cash presented, etc. In the U.S., a typical device is a query to a credit bureau in the last residence of the account applicant.

Is diligence associated with profitability and insolvency risk?

U.S. banks, given a diversity of policies and practices, hardly present an impervious barrier to the deposit of criminally originating funds or their transfer abroad. Nor is it their duty to do so, given their professed inability to police their customers' propensities. Since the volume of truly questionable funds entering the system must be minute compared to total banking volume, one cannot justify further strict but cost-ineffective measures such as client screening, or restrictions on interbank wire transfers, simply to meet that threat. However, failure to exercise due "diligence" clearly results in costs to the banks. Indeed, banks are routinely victimized by offshore based scams. They have been stung by accepting for deposit credit instruments of the "EuroBuncoBanks" of Antigua, Anguilla, St. Vincent and Montserrat, and, of course, Sark. It is said that Federal regulatory agencies maintain lists of these offshore bunco banks but their utility is questionable.

Hence, it is unrealistic to expect substantial increases in bank diligence policies given the costs associated with imposing such a regime.

Moving money offshore: Creation of trusts

Means other than direct transfers are used to place funds offshore for what can be tax evasion. For some years the IRS has been attacking various offshore trust schemes used as shelters in international tax planning. It has initiated prosecutions—successful and unsuccessful—against attorneys for conspiring with clients to evade taxation via offshore trust creation. Tax attorneys in the U.S. argue that the IRS is unfairly able to prevent offshore trust creation through the threat of later disallowing action, without having proven in court that a given trust scheme is, in fact, unsustainable. The cost of anticipated defense and possible disallowances discourages clients from the enterprise.

It is beyond the scope of this study to consider tax matters in detail. For a discussion of the multiple means to evade taxation via offshore devices, see Ass t. Attorney General Ferguson's testimony before the House Ways and Means Oversight Subcommittee (1979).[89] For the most comprehensive and authoritative extant description of asset estimates and devices, mechanisms, tax problems which the use of offshores entails, along with a helpful bibliography, see Gordon 1981(a) and 1981(b).[90]

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[89] Testimony of Mr. Carr Ferguson, Assistant Attorney General (Tax Division), at hearings on offshore tax havens. House Ways and Means Oversight Subcommittee, April 24, 1979, pp. 2-24.

[90] Tax Havens and Their Use by United States Taxpayers—An Overview, by Richard A. Gordon, January 12, 1981.

One bank's solution: Secrecy waiver for offshore trusts

Consider one major U.S.-based international bank's alternative to that diligence which is difficult to exercise when its customers are drawn from the world over. When accepting trust accounts for either U.S. citizens or foreigners, for administration by its higher-yield haven branches, the trust management agreement stipulates that the client consents to disclosure. The bank reserves the right to provide such information to authorities as the bank may deem necessary. This waiver is interpreted by counsel in haven countries as superseding any client rights under local secrecy law. It erects a protection for a local branch from either civil suit by the client or by the haven government for violation of secrecy obligations.

For deposits held onshore in the U.S. there is no need for contractual waivers. Local police authorities have access to depositor records.

Under Right to Financial Privacy statutes, federal authorities may approach a bank for access either with a grand jury subpoena or a court order, or may opt to write a letter of request. If the latter, banks are not obligated to respond. There are exceptional situations, but ordinarily the bank is obliged by law to notify the client of the access request. The client may then require that federal authorities show cause in court to justify access. Local and state authorities are not so encumbered; a bank is not obliged to notify the account holder of their interest, and the account records may be disclosed with depositor knowledge.

Banking and an anticrime ethic

Banks governed in the major trading nations offer the best point of intervention for ethical conformity via internal institutional regulation. The majority of banks in havens are governed by headquarters in major trading nations, themselves supervised by central bank authorities.

Typically in havens, as well as financial centers, branch bank management is expatriate. Englishmen run Barclays, Canadians the Bank of Nova Scotia, American the Bank of America, and Swiss the Credit Suisse, whether in Panama or the Bahamas. Local management must conform to the law of the heaven jurisdiction as regards secrecy, for example, but either headquarter rules or their own discretion governs their standards for the acceptance of new accounts. Not surprisingly, great variations in diligence occur. Havens differ dramatically one from another. Headquarter standards vary depending on the company and the homeland's central bank. Variations occur within the same banking company among its branches in an offshore. For example, in the Caribbean, one major Canadian international bank has a consistent reputation for encouraging dirty money; one small branch of a U.K. bank in the Bahamas is held suspect for its own manager's discretionary tolerance in accepting questionable funds. In the Caymans or Panama, the majority of banks are said to accept suitcase currency.

Critical control points: A central issue is bank supervision

There are three fulcra where a supranational standard can be applied, that facilitated by the likelihood that managers are expatriates, or, if not, have been trained to an international standard before appointment. The first fulcrum is local supervision by the main branch where there are several local branches in the haven jurisdiction. The second fulcrum is headquarter supervision (attenuated when a haven bank is in another haven). The third fulcrum is central bank supervision in the home country. There can be philosophical conflict over primacy of home versus host country bank controls, but for serious regulation this conflict applies only to Eurobanks located in financial centers, i.e., whose interests govern a Swiss branch in New York. In no haven country are central banking controls as strict as those in the major trading nations. Indeed, in many havens the only control over banking is that which is exercised from the home country. Thus, for B or C license banks (not local commercial banks) which are not international branches, as in Anguilla or St. Vincent, there is no control whatsoever over activities. Yet, when there is a headquarters control, while it may benefit prudence, control defalcation and assure profitability, it need confer no benefits for supranational law enforcement. Headquarters control, as it stands today, is not enough.

No haven has indigenous adequate supervision

Because no haven has banking controls as strict as an international headquarters control, their stability as "havens" is constantly threatened. In our interviews, in every instance where there was a governmental banking authority with any sophistication, officials expressed an awareness of the limitations of their supervisorial inadequacy. Havens endeavor to bring in large international banks since with them come the benefits of better-regulated models. Where international banks were present, authorities, comparing the regulatory effectiveness of the headquarters nation against another, claimed to prefer that with the more prudent regulation.

International bank headquarters supervision is not adequate

Examination of actual offshore practices indicates that the offshore authorities' hope for investor confidence, when it rests solely on large international bank headquarters policies, is naive. Headquarters banks, which do not require the utmost care in their far fetched offshore branch operations, pay the price. In fact, failures arising from offshore operations can tarnish or topple the headquarters bank itself. Consider that the three most dramatic banking scandals over the last decade, defined in terms of assets lost, were all operations which involved or appeared to involve international activities. For Credit Suisse in Chiasso, the transactions were Italian-Swiss-Lichtenstein. For the Franklin Bank, the transactions were U.S.-Swiss-Italian, and the Banco Ambrosiano incident clearly involved the offshores. During the work on this study, the following appeared in the Wall Street Journal (July 12, 1982):

> Bank Ambrosiano, Italy's largest private banking group, has been rumored to be on the brink of financial failure since its former president . . . disappeared . . . and was found hanged in London. . . . The fresh capital is believed to be needed by three Banco Ambrosiano subsidiaries in Latin America to cover debts. The discrepancies on the

> books (are) . . . estimated to be $1.7 billion . . . . Much of the missing money is believed to result from unrepaid loans guaranteed by . . . the Vatican's bank . . . . The Vatican bank officials owns a $1.6 percent share in Banco Ambrosiano, but business involvement between the two banks is widely believed to far deeper than that. (The president of the Vatican bank) Archbishop Marcinkus of Cicero, Illinois, was a director of . . . a Banco Ambrosiano subsidiary in the Bahamas.

We held discussions with former or present central bank officials from France, the U.K., Switzerland, the IMF, and the United States. A number of cases were cited to demonstrate that headquarters banks may not only be negligent, but may tolerate more lax standards by local managers in their dealings with clients with criminal records. That expatriate managers of international bank branches do engage in corrupt relations with local officials has been alleged for a number of havens. Direct criminal involvement is also reported.

One can understand the milieu which generates management corruption when one realizes that not only is there an incentive for crime, but that punishment may be given for honesty. Senior bank officials (commercial and governmental) describe instances where headquarters banks have removed competent offshore managers for their failure to participate in the unregulated offshore system, i.e., by failing to optimize profits through corrupt relationships. Improper procedures are allowed to continue. How, one group of central bankers asked, could a major New York bank allow one of its 49 percent owned African subsidiaries, managed by personnel trained in and reporting to the New York headquarters, to continue over several years a practice of lending to credit-worthless borrowers, with resulting nonpayment of principal or interest, with no apparent audit alert to or in headquarters? The inference is that the improper loans were made in a political context to which headquarters itself was privy or indifferent, perhaps believing the cost one paid to stay in business.

The authorities with whom these discussions were held agreed that Africa, Central America and the Caribbean islands were the areas most vulnerable to involvements in politically corrupt or direct criminal matters where suitable control is not exercised by headquarters. Of these three regions, the Caribbean islands are characterized as the most vulnerable in the world. That appraisal conforms (although we did no comparative study in Africa) to our impression of gross inadequacies, improper influence, and reported criminal involvement in the Caribbean involving some banks, local officials, assorted travelling highwaymen, narcotics trafficers and the like. Our definition of the Caribbean would, however, include Panama.

Hence, it is apparent that self-policing by large international banks does not sufficiently allay risk to either their offshore operations or the home country bank itself. Moreover, present practice, given the immense variation by home and branch offices, does not assure any assistance in fighting the criminal use of offshores.

In theory, the single best point of leverage for internal control within the offshore system is the home country central banks, were they to govern their headquarter banks by setting standards and supervising conduct. But supervision in the real world involves questions of social conditions, politics, corruption and crime. The supervision required is not an audit of books but an audit of ethical conduct.

Central bank supervision is as yet inadequate

At the moment central banks of the major trading nations are indifferent toward offshore crime. Bank of France officials apparently believe they can exert no audit or control procedures over the offshore branches of French banks. Swiss federal authorities do not conduct independent external audits of an offshore Swiss bank, but rely on the potentially vulnerable relationships between the banks and the accounting firms paid by the banks. Could the Credit Suisse Chiasso caper—that theft of over one half billion dollars—have been detected after all?

One banker's argument likely to be heard here, as elsewhere, with regard to resistance to making public basic data on assets, liabilities, and objectively estimated risk as part of a commitment to entirely open dealing is that truth in the hands of the public is a dangerous thing: "It leads to instability; what one wants is confidence; all central banks seek to discourage speculation." That argument, applied, is that the absence of adequate supervision, and the pervasive secrecy protections allow a variety of commercial and political misconduct and discourage not speculation, but international criminal law enforcement.

Were some central banks to extend their supervision to forms of offshore diligence, disavowing those practices of exceeding leniency characterizing major and minor offshore jurisdictions, it is argued that the lesser regulated commercial enterprises will triumph commercially over all others. The economic prediction of substitution, one lenient competitor for the less lenient one, is held as justification, saying that, in essence, "if it is leniency that attracts business, then lenient we must be." Its corollary is, "others do it, therefore profit ourselves as well." It is a strange pragmatism based on a single abstract economic principle. No one is heard to venture a Gresham's Law of Haven banking, bad banking drives out the good, to the risk of all. Not heard in the convention bankers' common room is the question: when does competitive laissez faire' not apply? Is it not so that major clients will prefer to deal with banks and jurisdictions where they may have full confidence in commercial integrity demonstrated by full disclosure and the expulsion of scoundrels and montebanks? Not heard is the empirical evidence to the effect that honest international business can succeed in competition against unscrupulous ones, even opponents who bribe, lie and cheat (see for example Silverman, Lee and Lydecker 1982).[91] Civilized nations, and their institutions seek to advance to common good, not to surrender it.

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[91] M. Silverman, P. Lee and M. Lydecker, Prescription for Death, University of California Press, Berkeley, 1982.

These arguments are at the heart of one aspect of offshore banking crime. They are not relevant to causes of crime or incentives for fleeing taxation. They are germane to the question of whether laissez faire economics, even when it has entered the criminal margin, is to be constrained, once to "action" has conveniently been exported offshore, out of our own good neighborhood so to speak. Put simply, are major national central banks included in the charge to be one's brother's keeper, especially if brother is on a profitable vacation from morality in the Caribbean?

Several important recommendations toward excluding criminality

It appears that the BIS, the IMF, the World Bank or other international lending agencies do not address these issues. BIS and IFM are the two international agencies best fitted to expand their roles to promulgate the supranational anti-criminal ethic through requirements levied on headquarter banks, or in the IMF case, by expanding the scope of their concern which defines sensible and prudent policy by national banks extending it to those banks' supervision of *their* banking system. Where the IMF is not invited it cannot function, but a central bank's supervision of its commercial banks need *not* be defined as microeconomic policy. But international banks do function, and BIS can be a potential agent for the good in expanding central bank supervision. And given the reputation of IMF, its pronouncement of interest in the ethical arena will carry weight in the international banking community.

The task is obviously a long-range one. Education of banking personnel is essential. The technical competence of local governments to engage in supervision must be expanded via AID or IMF or other assistance programs. For problem countries, thoroughly independent teams must function to construct and run central bank authorities. Also necessary will be internationally available experts, not in traditional banking controls and monetary policy, but with investigative skills in financial policing which the expanded responsibility mandates. Central banking ethical audits must have the capability to identify local bank officials who are themselves corrupt.[92]

The latter requirement exposes local politicians, as well as offenders from other countries, to identification. That itself would be a potent political weapon in the hands of major trading nations. Naturally, corrupted local managers would themselves seek to invoke bank secrecy provisions (as has occurred in Switzerland—the claim of privilege between self as banker and nonimee and depositor). A condition for appointment to any bank management post offshore—or indeed to any bank employment—will be a waive of secrecy rights under local law.

In considering policy tools, the Reagan Administration has called for "strings" for countries receiving aid should the Caribbean Basin Initiative (CBI) become law. While information exchange is useful, it is no panacea. Ideally, a required IMF presence would be of significant value.

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[92] A very simple question to ask of any loan to a local official, his relatives, friends, or a local country, is whether a different standard of credit worthiness was applied. And for every line of credit or "rolled-over" loan extended to local individuals, ask why?

There is another tool to be considered for cleansing the offshores. Should the proposed central bank effort reveal that the primary tainted holdings in the offshore banking industry are (a) within trusts, personal investment companies and other special institutions holding and investing private capital, or are (b) themselves those entirely offshore banking companies which are subject to no supervision, then some other recourse *must* be available. The main Eurobanking business, in terms of dollar amounts, is not conducted in or through these mechanisms. One is aware, however, that these mechanisms may provide as much local income as interbank transactions (as in the Bahamas) or, because of licensing fees, nearly all local bank-derived income (St. Vincent etc.).

The tool to be considered is a forced choice. It is a choice paralleling Marshal Langer's recommendation in Congressional testimony in 1979.[93] It requires that all home country central banks oblige overseas branches under their supervision to exercise diligence in accepting clients for any form of trust account. Under present conditions, flight capital and tax-minimizing deposits could not be excluded through imposition of such a requirement because resistence and disruption would be too great. In any country where the IMF is providing extensive credit or technical assistance it could require that central banks extend their supervision to creditworthiness of all commercial bank loans as well as require additional "deposit diligence"—i.e. require a banker to judge whether to exclude monies derived from common and organized crimes. The prudent grounds for such a requirement are that thugs and gangsters are not good company for local bankers to keep if a country already insolvent—as the IMF audit testifies—does not wish to suffer further losses through fraud and other crime. Thus, this approach would involve a self-imposed requirement that a banker know where his money is coming from and where it is going.

The East Caribbean currency authority and the proposed central bank

In earlier discussions, ECCA officials indicated their willingness to work with the United States in amending, by regulation, the present IMF model which constitutes the proposed central banking structure. In particular, ECCA officials were at that time willing to incorporate those forms of supervision which have been discussed in this study, including diligence requirements and the examination of loan standards and practices involving local governments and officials. What the position of ECCA would be, if and when, it is ever transformed into a central bank is impossible to predict. Officials involved in the evolution of the ECCA should be encouraged to make their own central bank a world model with regard to its definition of its ethical role as opposed to local corruption involving banks and too-easy ingress of an protection for offshore criminal funds.

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[93] See, generally, testimony by Marshall J. Langer, in hearings on offshore tax havens, House Ways and Means Oversight Subcommittee, April 24, 1979, pp. 224-231.

A case in point

To take Montserrat as an example, whatever the commitment of its government to collecting licensing fees, its need is greater for the three international commercial banks to continue retail operations on the island. The program conceived above of home central bank control over branch operations might, as a quid pro quo, bring the benefit to Montserrat of control over present "looting" as charged by local officials. The coordinated central banks of the major trading nations, recognizing the cost to Montserrat of license fee losses, might well be able to structure long-term lending and economic development advice more than sufficient to offset licensing fee losses.

Explicit or implicit in the foregoing proposal are several elements. One is a coordinated increase in regulation through central banks in home countries. Second is the rigid imposition of a policed diligence requirement which would seek to ban criminal monies from the banking system. The diligence requirement focuses on transactions other than normal Euromarket transactions. Implicit in a diligence requirement imposed on offshore branches which deal with potential customers from dozens of countries, is the availability of an expanded communication network which would allow access to central files and to the credit, police and banking authorities of any nation for the purpose of inquiry. Implicit also is that nominee representation anonymous applicants for the purpose of establishing companies, banks and accounts would be limited to the attorney members of a disciplined, ethical Bar which would itself police the nominee's diligence in screening clients whom he is to represent. The Bar must have a backup criminal sanction. In nations where accountants et al. also establish companies, a similar professional organizational policing under the purview of the criminal law would be necessary. Finally, a cadre of investigators capable of examining the business aspects of crime, and sworn locally to observe secrecy laws during their presence "on assignment" to any haven jurisdiction would be necessary. Since the IRS is considered untrustworthy offshore, it would be necessary for this "lend-a-cop" system to rely on multinational resources to the exclusion of any IRS presence or of a too-large U.S. representation.

Explicit in the plan is that havens will not be asked to exclude flight capital or tax-minimizing monies in setting diligence criteria. Unfortunately, there is no international consensus about tax policy, about the criminal sanction applied to taxation, or any deeply-felt morality about tax obligations. To attempt to use an anti-crime measure capable of worldwide acceptance to enforce U.S. tax law will lead to initial rejection of the entire concept of expanded bank policing.

With respect to flight capital, so little of the world can be said to be financially secure that it does not behoove a coordinated banking system to publicize itself as denying financial security to the citizen's flight capital.[94]

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[94] The supposed Swiss rule is not feasible: no banker or nominee can promote or facilitate flight.

It is evident that the U.S., or any trading nation concerned over offshore abuses, must simultaneously pursue general and specific policies. General policies are those which alter federal law, involve international agreements, or would have a common effect through institutional influences worldwide, as for example that expanded IMF or central bank authority as advocated. Specific policies or strategies are those geared to individual havens. It is a general policy which recognizes multiple interrelated elements and options to be evaluated and coordinated. The specific strategy dictates an approach to negotiation with each haven jurisdiction. Both short and long-term efforts are implied. A musical analogy is this: there cannot be one loud blast of a trumpet, but a well-conducted program of a full orchestra.

Critical control points: Summary of conclusions

Whenever possible, rely on normal institutional policy rather than on the criminal law to ensure daily supervision of commercial/professional conduct which will deny to offenders services and facilities necessary to launder or hide.

Recognize that there is a chain of acquaintance, services, and a paper trail which links those laundering criminal monies to offshore banks and companies. Each of the links in this chain is both a necessary service point for laundering or other misconduct and a potential point for frustrating that misconduct.

U.S. banks are the most important recognizable first step in the export of criminal funds. While most banks, on the basis of their own self-interest (vulnerability to fraud), want to know their customers, present procedures for customer identification and evaluation vary considerably and are a local option, subject to banker's discretion. The banking community will do well to recognize the risk arising from failure to move into this area more aggressively. The banking community is to be encouraged to consider diligence requirements, self-policing efforts, and the possible risk of federal intervention if relief is not affected.

The point of particular weakness in reputable American banks is the discretion accorded individual officers with respect to foreign trust and deposit clients. For example, these officers interpret when and what "deserves" to be filed as a Currency Transaction Report, and decide whether credit or other checks are to be made on new clients. Banks are to be encouraged to examine the discretionary practices of their employees so as to determine what organization changes are necessary to protect against undesirable clients.

Treasury should consider whether, under the Bank Secrecy Act, it wishes to act to require banks to file a report whenever someone fails to provide a Taxpayer Identification Number (TIN) at the time a financial account is opened. Originally this was required, however, obvious impracticality has led to abandonment in practice. Bankers, for example, were reluctant to refuse new accounts to depositors of large sums. Banks are now simply required to maintain a list of those depositors who do not provide a TIN. The central problem is that there is a long list of persons and entities, including certain foreigners, not required to provide a TIN. The remedy here is administrative, including of course follow-up bank examination and penalty for consistent or significant failures to comply.

A useful report would include a list of every non-TIN account over *$X* (say $10,000). This would provide Treasury a means for identifying and tracking entities financially active in the U.S. but not tax paying. Were the report to provide supplemental information which banks would be required to gather, it would provide a useful data base which would include, for example, all Panamanian and Colombian currency exchange houses presently operating in the U.S.

The Congress should examine the impact on bank information of Section 6103 of the Internal Revenue Code and the Right to Financial Privacy Act. For example, a bank officer may be vulnerable under the act if he reports to Federal agents that, say, a Colombian visits his bank daily to purchase for $9,500 (obviating the CTR) a cashier's check payable to "cash."

Only recently has the government began to keep records of U.S. currency repatriation from each foreign national annually. The data from havens, coupled with data from IRS Form 4789 (CTR) which is capable of identifying U.S. currency deposited in U.S. accounts by persons (individual or corporate) legally resident in a haven jurisdiction, is a potential measure of financial activity in and through havens. This activity measure can be used to chart trends in haven use and may be one measure of illicit funds flow. It would be extremely useful to encourage Treasury—or other analysts or scholars—to correlate this haven financial activity data with other measures of country/specific criminality or laundering. At present the currency repatriation figures are not fully understood, as for example large flows from countries where neither flight capital nor haven activity is presumed.

Severe measures have been proposed to the staff by former SEC officials. One is to license banks specifically for rights to engage in wire transfers abroad, above certain amounts (say $10,000 per transmittal), subject to an agreement to exercise diligence. In this day of electronic funds transfer, such a proposal is unfeasible.

Empirical studies are necessary to describe the actual working of the CTR system at its point of bank origination. It is possible that local discretion, i.e., variation, is so widespread that much otherwise detectable crime is overlooked. The U.S. Customs Service should exercise more exit control over pilots of private charter and foreign airlines. The Congress may wish to expand Customs' power to make exit searches, to redefine violation as "attempt" as well as "export," and to allow larger payments to informants advising of dirty money on its way abroad. Such bill was introduced by Chairman Roth in the 97th Congress.

An empirical study should be made of the extent to which bank officers seek to use the SEC list of stolen securities and the Comptroller's ad hoc file of offshore banks implicated in bunco schemes.

The GAO should continue its monitoring of the utilization of CTRs, employing cost/benefit analysis, and continuing to suggest alterations in practice and law as seem necessary.

The U.S. Federal Reserve and the Comptroller of the Currency may wish to revise their own practices, given the dissatisfaction in Congress over the risks to depositors which occur as part of the apparently privileged relationship accorded to bankers in violation of law and prudent practice. A core issue is the preferred style within the banking community, incorporating governmental supervisors, which emphasizes confidential rather than public action. We believe that the trend, as expressed to the Congress, to require Federal examiners to disclose findings which bear on the public interests—as depositors or investors in banks—is proper. The thrust of SEC full disclosure requirements should apply to Federal banking controls.

The banking community *qua* association should be encouraged to consider what ethical standards are necessary to constitute credible public commitment to denying banking facilities to criminal elements. Since self-policing in any profession has inherent weaknesses, what mechanisms, including citizen participation, can be put in place so as to generate public trust in the sincerity and efficacy of such efforts? (Disciplinary models exist in the Bar and medicine which show strengths and weaknesses.)

U.S. banks operating internationally should consider incorporating into their offshore trust management agreements an "agreement to disclosure" clause which waives rights under offshore secrecy subject to the bank's judgment (whether signed onshore or offshore, and whether for citizens or through nominees and companies).

Once an East Caribbean Central Bank is in place and regional cooperation is developing, negotiators should consider an intra-Americas currency declaration form wherein all participating jurisdictions would require declaration of importation of substantial cash amounts.

Assist offshore jurisdictions toward the development of an organized, self-disciplining Bar with a supranational, crime-disavowing ethical code. Provide technical assistance in writing disciplinary legislation, and provide for fellowship exchanges for offshore Bar leaders to enable them to study U.S. or other disciplinary systems. The American Bar Association should be encouraged to take a leadership role in the execution of these programs, including financial support, although its recent pronouncements in the area of attorney/client relations give no indication whatsoever of an interest in self-policing.

Headquarters of international banks should be encouraged by central banking authorities to adhere to their formal existing standards for audit and supervision as regards branch/subsidiary offshore operations. Evidence of considerable variety in practice dictates improved routine offshore supervision.

Supervising international headquarters banks are to be encouraged, through coordinated organizations such as BIS and reputable international agencies such as IMF, to redefine their responsibilities, and, if necessary, to expand their charters for offshore operations to include ethical matters. It is necessary to recognize that a variety of practices, whether known or unknown to headquarters banks, threaten bank solvency and local economic stability and reputation. Standards must be agreed upon, ethical audit procedures developed, personnel trained and made available, information exchange procedures created, negotiations directed to local authorities, etc.

Under The Caribbean Basin Initiative, or other economic aid agreement from major trading nations concerned with the criminal use of offshores, it would be possible to encourage IMF technical assistance to assist in local central banking for economic stability and expansion. When already underway, IMF activities should be evaluated to see if resources are substantial enough to develop a strong intrinsic ethical supervisorial capacity. In most island havens it will be necessary to rely on foreign professionals hopefully not subject to local corrupting pressures. When IMF resources are insufficient, the aid programs of U.S. and other major nations should include the provision of personnel and funds sufficient to create satisfactory central bank supervisorial capabilities.

U.S. AID programs are currently mandated to focus on human needs rather than technical assistance. Congress may wish to consider mandating AID programs to improve central banking in offshore haven nations.

The role of U.S. agencies

In assessing the federal role over the decade since substantial attention was called to the offshore criminal arena, it cannot be said that federal actions have been consistent nor particularly diligent. In the 1960s it was primarily U.S. policy which created the Eurodollar market, of which havens are but an attribute. In 1981 IBFs were created, recognizing the continuing wish of U.S. banks to enlarge their competitive share of that offshore market (the related Edge Act dates to 1913). But the IBF development was not accompanied by any in-depth consideration of the criminal uses of the offshores.

In the 1970s the IRS, given an opportunity to investigate the ever emerging underground economy, expressed its disinterest by dismantling promising investigations. It was not until 1980 that the IRS made studies of the underground economy, nor did the IRS really begin to consider the cumulative tax losses via the offshores until about that time. The IRS experience with Projects Tradewind and Haven in the early 1970s, while evidencing interest in case investigation, unfortunately also revealed a certain ambivalence in how to proceed. In the time since, the IRS Office of International Operations has languished. The Service can be credited with commissioning the so-called Gordon report which estimated the underground economy and subsequent tax loss.

But other work and editorial claims are methodologically so questionable as to raise doubts about the government's ability to assess the nature of important tax-pertinent aspects of the U.S. economy itself.

As for the Department of Justice, beginning in the early 1970's, when suggestions were made that the offshore funds flow was a consequential matter, the Department responded with inattention, complemented by antiquated internal relations, which have all too often been the hallmark of agencies' roles in offshore crime. The establishment of Justice's Office for Internation Affairs has helped to reverse this trend.

On the other hand, it is not at all fair to expect comprehensiveness in policy, given a diversity among agencies with respect to constitutencies, interest and expertise, and the imposed political and economic pressures of a given moment. Among interest groups whose competing claims serve to diversify and set in competition the separate federal agency policies are: (a) the United States-headquartered international banks and the major industries to whom, and via the Eurocurrency market, credit is made available; (b) the United States Treasury itself, whose foreign creditors, acting through the Eurocurrency market, account for a significant percentage of all Treasury debt holders; (c) United States corporations trading and investing worldwide through the tax-minimizing and credit-efficient Euromarket haven system; (d) foreign governments who are the tax havens and who enjoy economic advantage in consequence; (e) foreign visitors whose income enjoys the tax advantages of the havens—advantages which are directly beneficial to U.S. corporate borrowers, for their borrowing costs include any taxes that investors must pay; (f) tax attorneys and other experts whose professional income rests on the creation and management of offshore structures, from tax-sheltered trusts for individuals or captive offshore insurance companies through the elaborate mechanisms of multinational corporations which allow transfer pricing and other devices for tax minimization; and (g) U.S. State Department personnel and policy makers whose own strategic perceptions or bureaucratic interests dictate internal policies and appeals for legislation.

Our study indicates, however, new promise. There appears to be the absolute necessity of integrated, multi-agency action. It appears to arise from the following events: (a) the work of economists, with their startling conclusions on the underground economy; (b) research analysis of business-type international crime; (c) pressures in Congress itself through various oversight hearings beginning about 1979, but preceded by several years with the work of the Permanent Subcommittee on Investigations itself on international drug trafficking and fraud schemes; (d) the cries of anguish from DEA, FBI and federal and state prosecutors who, in pursuit of evidence and offenders, are constantly frustrated by offshore concealment of the fruits of the crime; (e) the pressures of a federal budget unbalanced for so many years, and an anticipated 1983 budget deficit exceeding all before that, which have forced new IRS concern about uncollected taxes; (f) the cries of victims of frauds (e.g., bank, commodity, stock) perpetrated from sanctuaries offshore, where proceeds of fraud or other crime are safely reinvested, and where perpetrators may enjoy unextradited comfort; (g) dramatic, successful criminal investigations, such as those of Greenback or Bancoshares in Florida; (h) public awareness through the media, arising from all of the foregoing sources, which has resulted in the demand of a giant American constituency, frightened, perplexed and victimized by common crime, shocked to learn of the costs of it all which demands that aspects of crime be attacked.

Given the variety of interests groups and the diversity of origin of pressures for action, a learning curve as to the nature of the problem, it is clear that there are no simple solutions. A remedy which adversely affects the Eurodollar market is inappropriate. Moreover, Congress is not yet simplifying and reducing taxation so that no taxpayer will find it worthwhile to bury money overseas.

Th United States will not, for reasons of crime or tax loss, impose trade-destroying currency controls.

The United States cannot simply declare economic war on havens and Euromarket financial centers, for these include the United Kingdom, the Netherlands, Luxembourg-Belgium, Switzerland, Bahrain and Singapore. None of the above pose significant problems for U.S. criminal monies in flight. Yet even to launch a campaign against havens more readily accessible—Bahamas, Antigua, Panama, the Caymans—as we have seen is to risk costs far greater than benefits, and to ignore negotiable issues.

It is under these conditions of complexity that the examination of federal agency action is to be undertaken. It is not an examination which can be exhaustively conducted or reported here, and it is an examination which, when done, must be conducted with sympathy for the plight of the agencies.

The Department of Justice

> Every government agency is screaming for cooperation with each other in order to improve offshore success in criminal investigations and prosecutions. There is a great need for investigative agency and prosecutor coordination.—A Department of Justice official

Yet there is no source which guides any agency or prosecutor as to how best to seek information offshore. There is no existing file or computer program which might notify one agency that another is involved in investigations with an offshore component. Cases are jeopardized, foreign jurisdictions are confused and irritated, and prosecutions languish. Recent efforts here show promise, including improvements in the Office of International Affairs (Criminal Division) and training exercises such as a January 1983 seminar for Assistant U.S. Attorneys and investigators held in Washington.

The State Department

It is generally agreed that State Department attention to Caribbean matters has had a low priority; the area has always been considered minor. High turnover in haven countries, overseas assignment delays by th Executive Branch, a readiness to appoint patronage rather than professional diplomats, a lack of expertise and "institutional memory," are all complaints so consistently voiced they compel a conclusion as to their accuracy.

Internal Revenue Service

The work of the Gordon group remains an outstanding recent contribution in which there has been IRS participation. Augmenting this report would be in the best interest of the Service since the whole question of crime and the offshores is so murky. Credit is due to the IRS professionals who have maintained a powerful interest in the area, whether as investigators or research economists, and to the current Commissioner, Roscoe Egger, who has restructured the enforcement operation and availed himself of some imaginative approaches to the problem.

The Department of the Treasury

The Customs Service must be given credit for early recognition of the role of banks in laundering narcotics money. It is an enforcement program which has now proven dramatically successful in Florida investigations and should be applauded. But too little use is made of Currency Transaction Reports (CTR's) and Currency and Monetary Instrument Reports (CMIR's) and more resources need to be committed.

Treasury, in its international tax negotiations, has undertaken dramatically to revise the Netherlands Antilles and British West Indies withholding tax treaties. It is beyond the scope of this report to consider the withholding tax matter, but we welcome the well conceived and agressively innovative stance which these Treasury proposals represent.

Customs authority, as earlier noted, to conduct exit searches for funds, and to reward informants giving information about such money flows, is severely restricted. Congress should enact legislation in this area.

Securities and Exchange Commission

It remains possible that, surpassing narcotics money laundering, the largest area of offshore abuse involves corporate activity. Continuing attention must be paid to concealed insider trading and the export of funds as part of management fraud in concealment of profits which accrue to the personal benefit of conspiring groups of managers.

The Federal Reserve and Comptroller of the Currency

There is evidence of a need to reconcile traditional styles of bank supervision with the need to give notice to depositors of criminal and imprudent practices by banks, particularly offshore banks. Unfortunately offshore operations provide not only an opportunity for mischief but also for actions which jeopardize the solvency of domestic banks. The Federal Reserve and the Comptroller tend to define their roles conventionally. The Federal Reserve is not eager to expand its role toward closer offshore supervision, nor to embrace problems of criminality offshore which may touch on U.S. bank operations. An adjustment to this posture is called for.

Drug Enforcement Administration

The most visible and notorious aspect of offshore criminality involves drug traffic. The DEA, now subordinated to FBI mangement, is certainly on the front line with respect to investigations of the flow of money thorugh the offshores. The impression is widespread that DEA stations abroad are called upon to provide so much support to and become so involved in local policing (and sometimes are a substitute for that) that there are few resources available for associated financial investigations. Furthermore, one does not often see combined the skills of the "street-wise" narcotics investigator and the financial investigator. To the extent that DEA personnel assignments abroad may not include persons attuned to the business aspects of crime, detection of the business aspects of the use of offshores may be restricted. Concerned officials should evaluate the extent to which financial investigatorial skills might assist them in their primary mission.

But the prevalence of narcotics cases is not proof that drug monies constitute the largest element of criminal offshore activities. Because of moral, social and political concerns, drug enforcement has received a high priority. Known cases may reflect the intensity of the enforcement effort rather than a realistic estimate of the overall offshore "dark number." Furthermore, narcotics traffickers are typically characterized by lack of business training or international financial skills, unstable and explosive social relationships, and gross personality inadequancies, all of which features make them vulnerble to exposure through informants or ineptness. While the magnitude of international narcotics traffic is an argument for substantial enforcement resources, under present budget conditions, fund allocated to DEA mean that funds are not available to other agencies engaged in monitoring or investigation of business-type crime, notably SEC, Comptroller of the Currency, FBI, Justice Department, Department of Commerce, etc. If the federal investigative budget is to be increased, one must attend to the need to allocate funds based on which agencies are likely to be the most effective in combatting the root aspects of these crimes. If the DEA/FBI relationship can be shown effective in the haven area, resources are called for, if not, Customs and IRS should be drastically upgraded!

Panacea proposals abound

Since there exists no adequate institutional mechanism within the U.S. government, or in any international agency, able comprehensively to deal with the complexity of offshore business-type crime, consideration is inevitably given to legislation designed to establish such a capability. An ad hoc federal commission suggest itself. Its functions could include the accumulation and dissemination of information, the examination and facilitation of interagency and intergovernmental coordination, the evaluation agency problems and performance, and the provision of personnel and support to havens to improve central banking and to provide financial investigative service. Cooperation with the Peace Corps, with AID, and international agencies such as IMF and BIS would be necessary.

Such a commission could be semi-autonomous, with the freedom and responsibility to engage in negotiations with offshore institutions and governmental agencies. Its funding and statutory life could be limited, with operating funds possibly derived from forfeitures and fines which result from offshore convictions and settlements. Participation in the work of the commission, and its financing, would be encouraged from the international banking and business communities. Provisions could also be made for working participation by scholars, foreign police, banking, legal and accounting professionals on a voluntary basis or supported by external funds. But law enforcement efforts have been plagued by unending commission studies. More effective short term remedy would be the establishment of a task force within the Department of Justice which would have to be adequately funded.

Criminal cash movements

The Only Monitor: The Bank Secrecy Act

The Federal government's means of monitoring large cash transactions and the export and import of large amounts of cash is the Currency and Foreign Transactions Reporting Act of 1970, popularly known as the Bank Secrecy Act. Under this Act and its regulations: (1) a bank or other financial institution is required to file a currency transaction report (CTR or form 4789) with the IRS for each deposit, withdrawal or exchange of currency or monetray instruments in excess of $10,000; (2) a person must immediately file a report (CIMR or form 4790) with the Customs Service when physically transporting into or out of the United States any currency or monetary instruments exceeding $5,000; and (3) a person who owns or controls a foreign financial account must declare such ownership or control on that person's federal income tax return and also file form 90-22.1 with the Treasury Department.

These requirements were intended to disrupt the laundering and outflow of cash from criminal enterprises which have traditionally dealt in cash, particularly drug trafficking. But it was recognized from the start that enforcement might be difficult. As the Senate Report on the 1980 Act observed:

> Reports are not a foolproof method of preventing organized crime from sending currency out of the country. Obviously, a criminal who is already breaking the law could just as easily ignore the reporting requirement. The significance of requiring reports is that it provides the Justice Department with another means of obtaining a conviction. The mere failure to file a report would constitute a criminal violation much easier to establish compared to proving the funds transported were illegally acquired or were to be used for an illegal purpose. Those who fail to report would be subject to a criminal penalty of a year in prison, a $1,000 fine or both. If the failure to report was committed in furtherance of the commission of any other violation of federal law, or as part of a pattern of illegal activity involving transactions exceeding $100,000 a year, the person who fails to file a report to subject to a much stiffer penalty—5 years in jail or a $500,000 fine, or both. Finally, any unreported currency is subject to seizure, and forfeiture to the United States and those who fail to make required reports are liable for a civil penalty equal to the amount of currency transported less any amount already seized or forfeited.[95]

The Treasury Department sees the twin reporting requirements by banks and by travelers, as interrelated, at least theoretically. For example, if banks were not required to report large currency transactions, there would be little need for criminals to smuggle money into or out of the country. Currency simply could be taken into a bank and the funds transferred abroad to a secret bank account without disclosing the identities of the persons arranging the transfer or receiving the funds. Conversely, without reports on the import or export of currency, the requirement that banks report large currency transactions would be relatively ineffectual. Criminals could easily travel to a nearby foreign country and convert their currency into a more compact and more profitable form of wealth.

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[95] Senate Report 91-1139 to accompany S. 3678 on Foreign Bank Secrecy and Bank Recordkeeping, p. 7.

Some criminals have done just that, a minimal risk and with total impunity. An exchange between Vice Chairman Rudman and convicted drug dealer Harold Oldham at PSI hearings on international narcotics trafficking in November 1981 is illuminative:

> Senator RUDMAN. When you left this country, did you ever go to the Caymans when you were carrying large amounts of cash?
>
> Mr. OLDHAM. Yes.
>
> Senator RUDMAN. Was there every any questioning by anyone?
>
> Mr. OLDHAM. No sir. At that time, the primary access to the Caymans was through Miami Airport and the flights to the Caymans left out of Gate No. 1. Gate No. 1 was the only gate at the Miami Airport and to my knowledge almost any airport in the United States that did not have metal detecting devices or any security of any kind. Gate No. 1 was before you walk through any security area. I cannot explain this. I only know at that time it was easy just to walk from the ticket counter onto the aircraft without any examination of any kind.
>
> . . . I would fly down in the morning with cash. The corporate representative would meet me at the airport and take me to his office. We would contact the various banks to determine what their going rate was that day to convert U.S. currency into cashiers checks and we would bring the money to the bank and convert it to a cashier's check.
>
> I would then fly back the same day with the cashier's check. I took the money down but I brought it back in another form the same day.
>
> Senator RUDMAN. How much money did you launder in all.
>
> Mr. OLDHAM. Roughly half a million dollars.
>
> Senator RUDMAN. Over a period of how long?
>
> Mr. OLDHAM. Over a period of about two years, I believe.[96]

A PSI staff survey of major international airports in late 1981 revealed this discouraging picture:

Dulles International Airport, Washington, D.C.: Although signs notifying travelers of the requirement to file a form 4790 are posted at airlines counters, the airlines refused requests to furnish forms to passengers "due to union problems." More to the point, the forms must be picked up at the Customs office at the airport, but that office is open only from 8 a.m. to 5 p.m. and therefore is closed during the period of most international departures, between 6 and 7 p.m.

JFK International Airport, New York: Only one or two forms 4790 are filed by departing passengers per week, whereas about 850 are filed per week by arriving passengers. Customs officers have little contact with departing passengers, concentrating instead on arrivals.

Phildelphia International Airport: Only one or two 4790s are filed by departing passengers per week. Yet there is a strong notification effort: (1) airport security personnel ask passengers if they want to file a 4790 as they go through security screening; (2) notification signs jointly maintained by Customs and the airlines are posted at airline counters, in the Customs area, in the international terminals, at screening points, and at boarding gates.

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[96] PSI Hearings, International Narcotics Trafficking, November 17, 1981, pp. 285–286.

O'Hare International Airport, Chicago: Only two or three 4790's are filed by departing passengers per month.

Los Angeles International Airport: Customs has "a very active policy for investigating outbound South American flights" and this policy has been found to be "very lucrative." Notification signs are posted at every departure gate.

Miami International Airport: The Customs Director acknowledge that Customs' interest is confined to arriving pasengers, not departing passengers. Moreover, he said, with 25 international gates spread over a one-mile concourse, Customs' manpower resources make it virtually impossible to maintain what few warning signs exist, distribute and collect 4790s, and otherwise enforce the filing requirement. The airport director told PSI that the placement of notification signs is discouraged on grounds that they cause clutter, are difficult to maintain, and few people read them anyway.

Other drug smugglers are more cautious than was Oldham. IRS Special Agent Len Tracy, at the same PSI hearings in 1981, told how a major Midwest marihuana-smuggling organization known as "The Company" managed to circumvent the Bank Secrecy act requirement that banks file a form 4789 on every cash transaction of $10,000 or more.

> Senator SASSER. From a total standpoint, did you find that the currency reporting laws hindered this organization in its ability to move and conceal their money both within and outside the United States?
>
> Mr. TRACY. Not really, Senator. We found that most of the members of this organization were fully aware of our currency reporting laws and easily managed to evade them. Domestically, they kept their transactions with banks below the $10,000 reporting limit or used fictitious identification to identify themselves to any curious bank teller or bank employee.
>
> Internationally, they would easily move their money clandestinely out of the United States without detection. We have examples of people that did nothing for The Company but simply carry funds around, on some occasions going from bank to bank purchasing cashier's checks, under the legal reporting limit.[97]

A top member of The Company later explained to Senator Chiles why "we never had a problem" in circumventing the currency reporting requirements.

> Senator CHILES. Could you elaborate on how you got the money without having to worry about the currency laws? You said you broke it down into less than $10,000. Normally you would think somebody would notice a pattern of transactions, even though you are dealing with less than $10,000.
>
> Mr. JACKSON. There is no pattern. I could take a quarter of a million dollars today, and in a period of 4 hours, walk around the city of Washington, D.C. clean it up into anywhere between $5,000 and $8,000 cashier checks. Remember, we were operating in towns, most often people knew us, we would simply send people around to buy cashier's checks. It is a common practice. You have to understand in the United States, today, a $100 bill is just alike a $20 bill. Nobody notices the difference.
>
> Senator CHILES. Even though you would go into these banks routinely with $6,000 or $8,000, no one in the bank seemed to notice that there was anything out of the ordinary.
>
> Mr. JACKSON. We never had a problem.
>
> Senator CHILES. You never had a problem?
>
> Mr. JACKSON. Never.[98]

Convicted trafficker Harold Oldham told the Subcommittee how he got around the currency reporting requirements:

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[97] PSI Hearings, International Narcotics Trafficking, November 10, 1981, pp. 11-12.

[98] PSI Hearings, International Narcotics Trafficking, November 10, 1981, p. 34.

> Later in my dealings, I set up accounts with the Cayman branches of Barclays Bank and the Bank of Nova Scotia. Both of these accounts were in the name of Esmeraldes y. Mariposas (one of the "paper" corporations Oldham set up in the Caymans for money laundering purposes) though the passbook I received had only an account number on it.
>
> Thus, even if I made a large deposit into a U.S. branch of these banks any currency form filled out would reflect only a number, and not the company name or my name.[99]

Oldham told staff investigators that he did indeed make such deposits in the Barclays branch in San Francisco. Each deposit was then credited to his numbered account in the Barclays branch of the Caymans.

Some banks, especially small banks, have willingly participated in schemes to circumvent or evade the requirement to report cash transactions of $10,000 or more for the benefit of "white collar" or "blue collar" criminals alike. A 1982 federal indictment alleged that the manager of a New Jersey bank branch conspired with a wine importer to launder more than $1.45 million in U.S. currency during 1981 and 1982. The purported scheme worked this way: The importer would bring in cash in amounts from $10,000 to more than $400,000 in a satchel or a briefcase to the branch manager or place it in a safe deposit box to which the manager had access. The manager would then divide up the cash in such a way that no single record would show a transaction of more than $10,000. Sometimes the cash would be deposited into several different accounts controlled by the importer so that each deposit would be approximately $9,999. On other occasions the branch would transfer large amounts of cash by wire to other banks in the United States.[100]

The more intricate scheme which operated under Nathan Markowitz's direction through the small, family-owned Garfield Bank of Montebello, California, laundered $3.3 million in illegal drug money before the scheme was detected. Markowitz's clients brought huge sums to him for laundering. He would deliver this currency to the Montebello and Hollywood branches of the Bank. From there the money was transferred to trusts at the Bank of Bermuda which Markowitz had established for the drug dealers. The trust accounts were controlled by fictitious "investment adviser" companies which were registered in Liberia because Liberian law permits the issuance of bearer stock. Money from the Bermuda trusts was then wire transferred back to the United States as "loans" to the drug traffickers, and Markowitz and his CPA prepared phony documents to make the money appear to have a legitimate non-taxable source. Thus, Markowitz was able to conceal the nature and the amount of each client's income. The government stands to collect almost $2.3 million in fines, back taxes, penalties and interest as a result of successfully prosecuting the bank, its president, and another officer for failure to file the form 4789 currency transaction report and for tax evasion.

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[99] PSI Hearings, International Narcotics Trafficking, November 10, 1981, pp. 283–284.

[100] *U.S.* v. *Gaetano Nino Aita and Glenn C. Dougherty*, Crim. No. 82-202 (District Court of New Jersey at Newark).

From enactment to enforcement: A slow evolution

For most of the decade after passage of the Bank Secrecy Act in 1970, its reporting provisions were rarely invoked. An exception was the prosecution of Chemical Bank in New York in the mid-1970s for failure to file hundreds of CTRs in a major criminal money-laundering operation. The CTR requirement remains today as the provision of the Bank Secrecy Act most often enforced. Yet, what successful prosecutions have been undertaken usually arise out of investigations from a different starting point, such as those for drug trafficking. Other provisions of the Act, such as those requiring reports on the export and import of cash and on the ownership of foreign bank accounts, are rarely honored or enforced; violations are seldom detected and much less often prosecuted. As the Assistant Secretary of the Treasury for Enforcement acknowledged as late as 1979: "It's been a long time in being implemented fully." [101]

Initially, there was a delay of almost five years resulting from extensive litigation in California attacking the Act's constitutionality. The United States Supreme Court eventually upheld it. Then, there was a period of several years more during which the Treasury Department wrestled with the problem of how to implement it. For example, the IRS gave lackadaisical treatment to the requirement to declare ownership or control, or lack thereof, over a foreign bank account. That requirement wandered like an orphan, drifting from the front to the back of the federal income tax form 1040, was dropped entirely one year, and finally came to rest on Schedule C of the form. It appears to be largely ignored by the vast majority of taxpayers. And, neither the IRS nor the Treasury Department has any way of knowing whether the few "yes" or "no" answers are accurate, whether taxpayers who remain silent indeed have foreign bank accounts, and whether those who answer "yes" and also file the required Treasury form 90-22.1 correctly reflect the universe of foreign account holders who file U.S. tax returns.[102]

The Act imposes on the Secretary of the Treasury the responsibility for insuring compliance with the Bank Secrecy Act. In enforcing the requirement that banks file the form 4789 for large cash transactions, the Secretary may delegate responsibility to the various bank regulatory agencies: the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. Consequently, a uniform bank examiner's checklist was developed by Treasury and the

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[101] Hearings, Offshore Tax Havens, House Ways and Means Subcommittee on Oversight, prepared testimony of Richard J. Davis, Assistant Secretary of the Treasury (Enforcement and Operations), April 25, 1979, p. 372.

[102] The following table, supplied by IRS, shows the trend in responses to questions on Schedule C of the income tax form 1040 concerning the taxpayers interest in a foreign bank account or a foreign trust:

Year	Yes to both	Yes-bank	Yes-trust	At least 1 "No" box checked
1981	9,431	167,623	4,293	18,775,817
1980	3,803	151,259	642	16,689,151
1979	6,303	139,864	871	15,354,353

regulatory agencies. In addition, guidelines were agreed to for the disposition of any violations reported by examines for these agencies.

But it took several years for these procedures to be perfected and even longer for them to become even partially productive. One perfecting session took place in 1975 after it had become "apparent that bank examiners had not detected some serious violations of the currency transactions reporting requirement," the Treasury Department said in 1979. But then, it admitted: "The number of referrals to our Enforcement office, however, has remained very low." [103]

How low was indicated by statistics on bank reporting violations discovered by the Comptroller for the Currency. In 1977, its examiners discovered only 13 "separate potential violations" of the CTR requirement. The next year, the number had risen to only 46.[104]

The record of Federal Reserve Board examiners, which regulates FRB member banks, was equally dismal. From 1977 through the first quarter of 1979, out of about 1,000 banks examined each year, the FRB found only 49 banks in violation of the form 4789 reporting requirement.[105]

It is clear that both the Federal Reserve Board and the Comptroller of the Currency give low priority in their bank examinations to the transaction reporting requirement. In 1979, the FRB said flatly that "no violations warranting criminal referral have been discovered" by it examiners. The FRB explained:

> A primary factor limiting the Federal Reserve's ability to make referrals on questionable transactions concerns the inherent objectives of the examination process and the highly technical nature to tax laws and international financial transactions. Supervisory examinations are designed to determine the quality of bank assets, the safety and soundness of its operations and the bank's overall financial condition. Thus, examiners are not trained or instructed to uncover intricate tax violations to ferret out the complex tax implications of complicated foreign monetary transactions.
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> . . . While examiners analyze a bank's liquidity and deposit structure in an aggregate sense, examination procedures generally do not call for an account-by-account analysis of the identity or motives of individual depositors. Examiners are basically credit and financial analysts; they are neither trained nor instructed to conduct tax audits or scrutinize deposit transactions for their compliance with complex tax laws.[106]

The Comptroller of the Currency took essentially the same posture saying: "The examination process, whether applicable to domestic or foreign units of U.S. banks . . . principally focuses on the determination of the bank's financial condition and whether it is operating in a safe and sound manner." [107]

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[103] Ibid., p. 378.
[104] Ibid., p. 349.
[105] Ibid., p. 333.
[106] Ibid., p. 332.
[107] Ibid., p. 338.

Both agencies also noted a legal impediment: the Right to Financial Privacy Act of 1978. The Comptroller said: "That Act significantly restricted the (Comptroller of the Currency) from transferring financial records of bank customers or information derived therefrom to other agencies or departments. . . . Thus, if in the couse of an examination of a national bank a 'questionable transaction' involving customer records were encountered, the (Comptroller) could report the relevant facts to IRS or any other government agency only upon our determination that such transaction appeared to be evidence of a past or potential violation of law administered by the other agency.[108] Though some of these impediments could be removed by liberalizing the regulations under the Right to Financial Privacy Act, such remedies have not yet been initiated.

Against this background of slowly evolving, even slip-shod, implementation, it was not until the late 1970s and early 1980s that the governments began to act against what had become obvious noncompliance with the Act's reporting requirements. A 1979 Treasury Department study revealed tremenduos amounts of excess currency in Miami which by that time had become a large gateway for illicit drugs from South America; its currency suplus was one fallout from South Florida's burgening drug traffic.

Government investigators and prosecutors, backed by grand juries with authority to investigate both Title 18 (criminal) and Title 26 (tax) offenses began to move against Florida banks which had routinely accepted large amounts of cash, sometomes brought in paper sacks or suitcases, but had neglected to file the required reporting forms. The Treasury Department meanwhile tightened regulations which had permitted banks to exempt some of its customers from the reporting requirments. At the same time, federal law enforcement authorities began moving on other fronts. Throughout Florida, they identified and prosecuted illicit private money launderers, and set up their own money-laundering "sting" operation in Miami. The net result was several indictments against bankers and bank employees, drug dealers, couriers, and money launderers. (Operations Greenback and Banco).

But there remained a yawning gap in control over large amounts of currency actually hand-carried out of the country. As noted earlier in this study, the evidence indicates that little or no effort is made be Customs agents at major airport exists to search departing passengers for unreported cash or even to inform them of the reporting requirement. Some court decisions have held that a vilolation does not occur until after the passenger is airborne en route out of the United States.

During the 97th Congress, Chairman Roth introduced legislation to expand the Customs Service's search authority under the Bank Secrecy Act. Questions regarding the Constitutional propriety of Customs officers conducting warrantless searches of outbound travelers based upon reasonable cause were answered by a Treasury department enforcement official who testified at PSI hearings in November 1981. "It (is) The Treasury Department's position, then supported by the Justice Department as it is now, that the well established Customs border search authority extends equally to exiting as well as incoming travelers." The official cited "ample authority" for Treasury's position.[109]

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[108] Ibid., p. 348.

Yet, despite favorable case law supporting broad application of Customs' border search authority to exiting travelers, agents and inspectors are reluctant to use it in unreported currency cases because of the express probable cause—warrantless search requirements of Section 235 of the Act and its underlying legislative history. This reluctance is based upon a fear on their part of incurring personal liability. The following incident was described as being illustrative of Customs' dilemma:

> Customs agents received unverifiable information that a Peruvian alleged cocaine smuggler would be leaving Los Angeles International Airport for Lima, Peru, later that day on a Braniff flight. After deciding to interview the man, they followed him to the boarding platform area and noticed that he appeared nervous, perspired heavily, and met with an unidentified Latin man who gave him a black plastic bag.
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> As the Peruvian was about to board the plane, the Customs agents stopped him and advised him of the currency reporting requirement. He replied that he was aware of the requirement but was not carrying more than $5,000. The agents asked if they could search his luggage. He refused. Thus, because probable cause could not be established, he was allowed to board the plane.
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> However, at the request of DEA authorities, Peruvian customs officials arrested the traveler on his arrival in Lima and found $95,000 in cash in his luggage.

The staff concludes that action in this area is seriously needed and unreasonable expectations are being placed on enforcement authorities.

Despite some successes, little is known

Thirteen years after its passage, the Bank Secrecy Act and the administration of it has been a monumental failure in two important respects. It has failed to measurably slow, much less halt, movements of illegally derived currency from the U.S. Moreover, while some prosecutorial successes have provided an inkling of the "big money" involved in these money movements, the Act had failed to yield sufficient data about onshore and offshore money laundering for the adequate formulation of policy or for the development of appropriate legislative, administrative and diplomatic remedies.

Thus, the list of unknowns is long:

> Despite the requirement that each $5,000 or more in currency exports or imports be reported, nobody knows how much money from criminal and noncriminal sources goes offshore and is thus hidden from the IRS. Consequently, the federal revenue loss is unknown, although it is suspected to run into billions of dollars annually.

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[109] Hearings, International Narcotics Trafficking, testimony of Robert E. Powis, Deputy Assistant Secretary of the Treasury (Enforcement), November 17, 1981, p. 347.

Despite the requirement that currency transactions in excess of $10,000 be reported, nobody knows how many banks fail to file such reports or what these unreported transactions actually amount to.

Despite the requirement to report all foreign bank account holdings to the IRS and the Treasury Department, nobody knows how many Americans own foreign accounts, the total amount held in these accounts, or in what offshore bank or jurisdictions they exist.

Thanks to what one observer has called "the veil of tiers" [110] afforded by foreign commercial secrecy laws, nobody knows how many Americans are the beneficial owners of offshore "paper" corporations through which their money is laundered.

Because of the thin line between tax evasion—which is illegal—and tax avoidance—which is legal—it is difficult if not impossible to establish whether an offshore transaction violates U.S. law.

Again, because of the offshore tier of secrecy, nobody knows how much of the money coming back into the U.S. from haven countries was derived from criminal activity or is intended for further illegal purposes such as the payment of bribes or drug shipments.

Because the Bank Secrecy Act does not apply to wire transfers, nobody knows what percentage of the billions wired from this country every day represents earnings from criminal enterprises.

The number of offshore banks and companies owned by Americans, the size of their assets, and the extent to which they are being used for tax evasion or other unlawful purposes is simply unknown.

An analysis of currency transaction reports for 1981: More questions raised than answered

An analysis of 1981 CTRs may provide some insight into how much currency from persons and organizations (including banks) giving non-U.S. addresses transits U.S. financial institutions. Total 1981 deposits by such foreign based entities into U.S. financial institutions totalled $2.451 billion. Withdrawals totalled $3.773 billion and other currency transactions totalled $2.534 billion. Total transactions reach $8.758 billion.

Knowledgeable authorities have found it difficult to ascertain the significance of these figures, except to say that there is a large amount of foreign based currency transiting the U.S. in an era when currency plays a very small role in legitimate commerce. Few, however, will state that the bulk of this currency is therefore non-legitimate or ciminal currency.

In a few cases, the economic conditions allow for reasoned judgments as to the nature of this foreign based currency. Argentina, as a case in point, surpasses all other countries in each category with $655 million in deposits, $1.064 billion in withdrawals, and

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[110] Testimony by Harvey P. Dale at hearings, on offshore tax havens before House Ways and Means Oversight Subcommittee, April 24, 1979, p. 236.

$587 million in other transactions. Given political and economic factors in Argentina, one can reasonably assume that the bulk of this currency represents flight capital. Similar judgments can be made about other countries which have seemingly inordinate currency movements through the U.S.

An analysis of the individual CRTs filed for addresses in the Caymans, the Bahamas and Panama reveals that $113 million in currency was deposited from Cayman, $143 million was deposited from the Bahamas and $139 million was deposited from Panama. Virtually all the currency deposits from the Caymans and the Bahamas were made by banks, whereas only $6.1 million of the $139 million of deposits from Panama were from banks. Again, it is reasonable to conclude that the currency deposits from the Caymans and the Bahamas represent currency received in those two countries which is in excess of their operating needs. The banks therefore return it to the U.S. Whether this currency comes from individuals or other individuals, foreign banks, tourism or illegal suitcase currency from the U.S. is impossible to say.[111]

An analysis of the CTRs with Panamian addresses tells a completely different story, however. These CTRs show $139 million in deposits, $6.5 million in withdrawals and $9.7 million in other transactions for a total of $155.2 million in currency transactions transiting the U.S. We now have firm indications from law enforcement sources that at least $133 million or 86% of those currency transactions are from narcotics laundering operations. In fact, the great percentage of that $133 million is money from the streets of U.S. cities which was deposited into the accounts of alleged currency exchanges using Panamanian addresses. The exchanges have been found to be owned and operated by Colombians who are in the business of laundering drug proceeds for other Colombian drug traffickers.

The size of these figures is disturbing enough. One individual, for instance, deposited more currency on behalf of his Panamanian front operation in 1981 than was deposited by all the banks in the Caymans for the same year. But even more disturbing is the statement that these figures are miniscule when compared with the amounts that are actually involved in laundering but are either not reported or are not so readily identified. We hear, for example, that one individual was responsible for laundering one half billion dollars over a three to four year period; and he is not the biggest fish in the sea. Such figures quickly tax one's comprehension.

The significance of this brief examination of CTRs would seem to be that these figures could well be the tip of the illegal currency iceberg. What would such an analysis of U.S. based CTRs show? How much money transits the U.S. and never gets reported? Most importantly, and most disturbing is the question of how much currency leaves the U.S. and never comes back; at least in any recognizable form?

The Treasury Dept.'s Federal Law Enforcement Center, with its rooms full of CTRs and other related currency forms is fighting this tidal wave of data with its computers. But they can only analyze what is reported. The rest, and perhaps the largest amount of this dark figure lies somewhere out there behind the secrecy walls of the havens.

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[111] A PSI analysis of CTRs involving Banco Ambrosiano of Milan, Italy, shows that $5,688,739 was repatriated in 1981 and $21,399,199 in 1982—a 376 per cent increase.

Law enforcement approaches

Viewed against the enormity of the illegal drug business alone—sales nationwide on the order of $80 billion to $90 billion a year—the successes of law enforcement in tracking and prosecuting the flow of criminal money offshore have been relatively few; most are of only recent vintage. What successes have occurred, however, furnish some insight into the size and the pervasiveness of the problem.

1. Operation Greenback

The federal government's principal attack against the financial underpinnings of narcotics trafficking has occurred in South Florida in a multi-agency effort known as Operation Greenback.

Deputy Assistant Secretary of the Treasury (Enforcement) Robert E. Powis described Greenback as "an effort to get at the major drug trafficker and his money laundered through the Bank Secrecy Act and the requirements that the Bank Secrecy Act imposes on banks and on individuals, the report requirement."[112]

Since it began about three years ago, Greenback has been a notable success. It has resulted in the seizure of more than $18.6 million in cash, and property valued at more than $2 million. It has placed jeopardy assessments of more than $112 million. It has resulted in the arrest of 61 major narcotics violators. Indictments have been handed down on 90 individuals or corporations. And last year alone the Treasury Department provided DEA with data from more than 52,000 Bank Secrecy Act reports that reflected transactions—principally in Florida—totalling more than $21 billion. A large portion of these transactions are believed to be drug related.

For good reason Operation Greenback has been aimed almost exclusively at the laundering of drug money. The consequence, however, is to leave virtually untouched the many so-called "white collar" criminals who may be just as guilty of violating the reporting requirements of the Bank Secrecy Act.

2. Operation Bancoshares

About the time that Operation Greenback began, the Federal Bureau of Investigation opened a "sting" money-laundering operation in downtown Miami.

This operation grew out of FBI bank fraud investigations, one of which had revealed $60 million in wire transfers in five months in one bank's correspondent accounts. Of the 36 names found in these accounts, 28 were Class I violators in the records of the Drug Enforcement Administration. It was suspected that other banks would also be involved because banks make significant commissions on large transactions. Suspicious transactions included a payment for ship repairs out of an account purportedly owned by a grocery.

In setting up their Miami laundry, the FBI agents put $6.5 million in operating capital into one non-interest bearing account at a local bank and offered five money-changing services to prospective customers. Because the operation gained a reputation for honesty (no short counts, for example), the business grew. The operators furnished readily cashable instruments. If the client wanted the name of the payee left blank, that would be done. The office received numerous invitations to get into the drug business, but all were declined.

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[112] Testimony at PSI hearings on International Narcotics Trafficking, November 18, 1981.

Because the checks it issued were returned to the office, a paper trail was established starting with the name of the payee inserted either by the office or by the customer. The "sting" operators never lost control of any money. Million dollar washes were not uncommon. The operation laundered more money in the last five months of its life than it had in all of the first 17 months.

All told, $177 million was laundered in 21 months. The FBI made more than 600 videotapes and more than 400 audio tapes of transactions. Scores of individuals were indicted. The office made $765,000 in commissions and returned $300,000 of this to the Treasury, the balance being used to finance day-to-day operations. In addition, nine safe deposit keys were seized, along with 22.4 pounds of raw cocaine, 20 vehicles, a 4,600-acre ranch and 700 to 800 head of cattle. Fifty-four bank accounts in Miami and New York were also seized. This "take" produced leads which federal financial investigators have been using to track many more law violations.

3. Breakthroughs in the Caribbean

In 1982 U.S. prosecutors made a major breakthrough against banking and commercial secrecy laws in the Cayman Islands. They did so by going to the equivalent of the appeals courts for the Caymans, the Supreme Court of Jamaica, and having overturned an order of the Caymans' Grand Court which had kept sealed bank and company records against U.S. intrusion.

The case involved Joseph C. LeMire, an officer of two Raytheon Company subsidiaries. LeMire was accused of padding a contract for shipping modular housing from the U.S. to Saudi Arabia and of dividing up the overpayment of about $2 million with his co-conspirators. Federal prosecutors spent three years tracing the money through Swiss accounts of Liechtenstein companies to banks in Bermuda and the Caymans. Almost $1 million went into Cayman accounts. In many ways, it represented the classic layering of company secrecy.

To prove that part of the cash went to LeMire, Justice Department lawyers first tried to get Cayman banks to open their records, but the banks refused and were upheld by the Cayman Grand Court. So the Department took the unprecedented step of appealing to the higher court in Kingston, Jamaica. The court held that Cayman secrecy laws must yield if the documents sought are relevant to a prosecution in which charges have been filed and if the offense would be a crime in the Caymans—all elements present in the LeMire case.

Morever, the Jamaican appeals court rules that criminals were not supposed to be protected by Cayman secrecy law, saying: "There is nothing in the statute to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of a crime in the Cayman Islands, secure from detection and punishment."

No doubt, the Justice Department expects to follow the same appellate approach in future cases of criminal money-laundering in the Caymans but the process is extremely laborious and thus expensive.

Another approach would exploit the developing practice of obtaining records from an offshore bank by subpoenaing them through the U.S. branch of that bank. Such an approach was upheld in November 1982 when the federal appeals court in Atlanta affirmed a civil contempt citation and fines against the Bank of Nova Scotia for failing to produce records from its branch in the Bahamas.[113]

4. Another breakthrough: The United States-Swiss accord

The year 1982 was also a red letter year for the United States in opening another hole in Swiss bank secrecy. For the first time, this country and Switzerland signed an agreement under which the Swiss will cooperate in tracking down those suspected of violating U.S. laws against trading securities with insider information.

Of the $75 billion annually in foreign trading on American stock markets, almost $15 billion comes from Swiss banks. The Securities and Exchange Commission has long suspected that much of this trading was triggered by insider information. But none of these suspicions could be verified because of Swiss bank secrecy laws which subject violators to stiff penalties—a jail term up to six months and a fine up $50,000 Swiss francs (about $23,600).

Under the new bilateral agreement, when the SEC has evidence indicating insider trading in a security, it makes a formal request to the Justice Department for assistance from Switzerland. The request is passed on by Swiss government officials to Swiss banking officials, who are then permitted to make available information in their accounts.

Whether the 1982 agreement will substantially curb the use of secret foreign bank accounts as a shield for insider trading violations remains to be seen. No sooner had the agreement been signed than there was speculation, among American bankers particularly, that violators would simply move their accounts to other countries with strong secrecy laws—Panama, Liechtenstein, and the havens of the Caribbean and the lower Atlantic. Moreover, the Swiss themselves rejected an SEC request for names of Swiss bank clients who bought Santa Fe Securities because the trading in question occurred after January 1983, the effective date of the new agreement.[114] Nevertheless, the U.S.-Swiss accord represents a potential victory in the war against offshore secrecy.

VII. PAST CONGRESSIONAL EFFORTS: A SUMMARY

Various Congressional committees in the past decade have focused on a wide range of issues related to the use of tax havens and offshore banks and to the United States response thereto.

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[113] *U.S.* v. *Bank of Nova Scotia*, GJ 81-F1-1, District Court for the Southern District of Florida (1981). See also U.S. v. Quigg, Crim No. 80-41-1, District Court of Vermont (1980).

[114] Wall Street Journal, February 4, 1983.

While the largest number of hearings and reports have been concerned with the currency reporting requirements of the Bank Secrecy Act, others have dealt with the offshore flow of profits from narcotics trafficking and several types of fraudulent operations, IRS efforts to investigate offshore tax evasion, and international banking operations generally.

One of the earliest and most revealing public disclosures of offshore banking operations in the Caribbean came at 1975 hearings before the House Government Operations Subcommittee on Commerce, Consumer and Monetary Affairs. Witnesses told how the Castle Bank & Trust Co. of Nassau, the Bahamas, was "controlled" by Chicago tax law firms for the benefit of more than 300 account holders who represented about $250 million in assets in various trusts. But the Nassau bank was only a bookkeeping operation; it merely recorded what one witness said were "hundreds of thousands, even millions of dollars, narcotics money possibly," in deposits made in correspondent banks in the United States and credited to the numbered accounts in Nassau. Thus, while appearing to do so, the money never left the United States. These 1975 hearings also chronicled the collapse—some alleged the deliberate self-destruction—of several IRS investigations in the Caribbean, chiefly Operation Tradewinds and Project Haven, because of methods used to obtain documents concerning the Castle Bank accounts.

In 1979, the House Ways and Means Oversight Subcommittee held hearings on offshore tax havens which illustrated the difficult task of the IRS in enforcing our tax laws on income earned or sent abroad. As Chairman Sam M. Gibbons put it, "The U.S. tax collector runs up against bank secrecy laws, numbered bank accounts, and a host of other barriers to information" about such income. Yet, he noted, "There is evidence that some sophisticated taxpayers have successfully hidden substantial wealth in secret bank accounts and trusts and are not about to volunteer that fact to the IRS."

The following year, the Ways and Means Oversight Subcommittee held hearings on income tax treaties between the U.S. and other nations, including tax havens. Among its findings were that some tax treaties, while having as their goal the elimination of double taxation, are often abused by third-country residents to avoid paying either the U.S.'s or the third country's tax—an abuse commonly known as "treaty shopping." The two treaties which have been used extensively by "treaty shoppers" are those between the U.S. and the Netherlands Antilles, which four years later is still under renegotiation and the British Virgin Islands, which the U.S. elected to cancel at the end of 1982.

Over the past six years, as evidence mounted that narcotics trafficking was generating huge outflows of cash and currency surpluses in South Florida and along the U.S.-Mexican border, several Congressional committees and subcommittees have considered legislation to plug holes in the 1970 Currency and Foreign Transactions Reporting Act. These included, in the House, the Committee on Government Operations (1977 Report); its Subcommittee on Commerce, Consumer and Monetary Affairs (1977 hearings); the Select Committee on Narcotics Abuse and Control (1978 hearings); the Banking, Finance and Urban Affairs Subcommittee on General

Oversight and Renegotiation (1979, 1980 and 1982 hearings); the Committee on Ways and Means (1980 report); and, in the Senate, the Committee on Banking, Housing and Urban Affairs (1980 hearings).

One proposed Bank Secrecy Act amendment would make it a crime to "attempt to take out of or bring into the United States large amounts of currency or negotiable instruments without filing a declaration. Present law makes it illegal to take out or bring back $5,000 or more without filing a declaration. However, the courts have held that a person cannot be arrested unless he has actually left the country, thus escaping U.S. jurisdiction.

Another proposed amendment would allow Customs agents to search for unreported amounts of cash in excess of $5,000 where reasonable cause exists that the money is about to leave the country as a result of illegal activities. Still another proposed amendment would reward informants with 25 percent of the amount recovered, up to a maximum of $250,000.

While these amendments were first proposed in the late 1970s, it was not until 1982 that versions of all three were approved by the Senate, as part of S. 2572, the Violent Crime and Drug Enforcement Improvements Act of 1982. That bill, introduced by Chairman Roth and co-sponsored by several PSI members, would also increase the threshold for reporting cash imports or exports from $5,000 to $10,000; increase the civil penalty for willful violation by a financial institution, its officers or employees from $1,000 to $10,000; and raise the criminal penalty from the present misdemeanor level to a felony punishable by five years' imprisonment, a $50,000 fine or both.

PSI hearings on Medicare home health care fraud and on international narcotics trafficking, both in 1981, and on commodity investment fraud in 1982 began to shed light on the pervasive use of offshore tax havens and bank-corporate secrecy for criminal purposes. In the home health care fraud hearings, it was shown that $450,000 of almost $1 million in Medicare funds which a Chicago home health operator and his associates had extracted over three years found its way to a Cayman Islands tax shelter. Claimed tax deductions of almost $1.8 million on their 1978 and 1979 tax returns gave the tax shelter partners a return of almost 400 percent on their investment.

In PSI's 1981 narcotics hearings, a convicted cocaine dealer told how he hid or laundered almost $500,000 of his profits by using, first, a phony loan agreement and then, as his profits increased tremendously, a Cayman Islands shell company and numbered accounts in Cayman banks. He also took large amounts of cash by plane from the U.S. to the Caymans without Custom interception. And in the commodity fraud hearings in 1982, several convicted swindlers explained how they used companies in Panama and banks in Luxembourg, Panama and the Cayman Islands in carrying out their multi-million-dollar fraud schemes.

Following is a chronological list of Congressional hearings and reports involving offshore entities, bank secrecy and related issues:

"IRS: Taxing the Heroin Barons," volume II, Hearings, Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, 1975.

"Oversight hearings into the Operations of the IRS (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program)," Hearings, House Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs, 1975.

"Foreign and Corporate Bribes," Hearings, Senate Committee on Banking, Housing and Urban Affairs, 1976.

"Prohibiting Bribes to Foreign Officials," hearings, Senate Committee on Banking, Housing and Urban Affairs, 1976.

"Internal Revenue Service and Treasury Department Enforcement of the Foreign Bank Account Reporting Requirement of the Bank Secrecy Act," second report together with additional views, House Committee on Government Operations, 1977.

"International banking operations," Hearings, House Committee on Banking, Finance and Urban Affairs, Subcommittee on Financial Institutions, Supervision, Regulation and Insurance, 1977.

"Currency transaction and transportation Reporting Requirements of the Bank Secrecy Act," Hearings, House Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs, 1977.

"Investigation of Narcotics Trafficking Proceeds (Chicago, Illinois)," Hearings, House Select Committee on Narcotics Abuse and Control, 1978.

"Offshore Tax Havens," Hearings, House Committee on Ways and Means, Subcommittee on Oversight, 1979.

"Edge Corporation Branching; Foreign Bank Takeovers; and International Banking Facilities," Hearings, Senate Committee on Banking, Housing and Urban Affairs, 1979.

"The Operations of U.S. Banks in the International Capital Markets," Hearings, House Committee on Banking, Finance and Urban Affairs, 1979.

"Patterns of Currency Transactions and Their Relationship to Narcotics Traffic," Hearings, House Committee on Banking, Finance and Urban Affairs, Subcommittee on General Oversight and Renegotiation, 1979.

"Illegal Narcotics Profits," Hearings, Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations, 1979; report together with additional views, 1980.

"Currency and Foreign Transactions Reporting Act Amendments," Report to accompany H.R. 5691, House Committee on Ways and Means, 1980.

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"Improper Use of Foreign Addresses to Evade U.S. Taxes," Hearings, House Committee on Governmental Operations, Subcommittee on Commerce, Consumer and Monetary Affairs, 1982.

"To Investigate the Enforcement and Effectiveness of the Bank Secrecy Act," Hearings, House Committee on Banking, Finance and Urban Affairs, 1982.

"Citicorp and the SEC," Hearings, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, 1982.

Fresh initiatives: The Caribbean Basin Initiative

Potentially the best hope for the U.S. penetration of banking and commercial secrecy in the Caribbean is the Caribbean Basin Initiative, which President Reagan unveiled before the Congress on March 17, 1982. One part of the comprehensive economic development plan was of major significance to opponents of offshore secrecy: For the first time, the Administration proposed that Caribbean countries who participate in the investment tax credit provisions of the plan, be required to cooperate fully in U.S. tax investigations involving Americans.

Under this proposal, Americans who invested in any of the 30 eligible countries would be entitled to tax credits only if the country entered into a bilateral executive agreement with the United States. This agreement "shall provide for the exchange of such information, not limited to information concerning nationals or residents of the United States or the beneficiary country, as may be necessary and appropriate *to carry out and enforce the tax laws of the United States and the beneficiary country, including information which may otherwise be subject to non-disclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares.*" (emphasis supplied)[115]

A Treasury Department statement to the House Ways and Means Subcommittee on Trade noted that "several countries in the Caribbean Basin region are tax havens which have been used for avoidance and evasion of U.S. tax law." It added: "We do not believe that it is appropriate for countries to benefit from U.S. tax incentives unless they are willing to cooperate with the United States in matters of tax administration.[116] A Treasury tax analyst, quoted by the Los Angeles Times, said, "We're seeking the kinds of information which the Internal Revenue Service would request in the course of a civil tax audit or a criminal tax investigation. This would include information that would otherwise be subject to the bank secrecy statutes of those countries." The analyst went on to say that cooperation with Caribbean tax havens was being sought "in order to preserve the integrity of the U.S. tax system."[117]

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[115] Section 303(b) of Caribbean Basin Initiative program as sent to Congress by President Reagan in March 1981.

[116] Hearings, House Ways and Means Trade Subcommittee, March 17, 1982.

The same Los Angeles Times article cited an IRS estimate that $100 billion to $135 billion in U.S. income escapes taxation every day by being funneled through secret foreign bank accounts. It further said the General Accounting Office had reported that foreign accounts and other techniques are being used by Americans to deprive the U.S. Treasury of an estimated $80 billion in actual tax revenue during 1982.[118]

In response to the Administration's initiative, PSI Chairman Roth announced that the Subcommittee was stepping up its investigation of bank secrecy and tax havens in the Caribbean. He praised the Administration's proposal as a "major breakthrough in the battle against international narcotics traffickers and other organized criminals."[119]

Chairman Roth noted that the Subcommittee had held hearings during the past year on international narcotics trafficking, commodity investment fraud, and fraud in the Medicare home health care program, and he added: "These hearings demonstrated that drug dealers and other criminal elements make regular use of secret bank accounts and 'paper' corporations in several of these Caribbean countries. The accounts are used to hide enormous illegal profits from the tax collector and law enforcement authorities and to launder money to pay bribes and to reinvest in legitimate enterprises back in this country.

"Since these countries have refused official U.S. inquiry into the channels through which this illicit cash flows," he went on, "one can only guess at the size of the revenue loss and other fiscal and economic impacts. But they must be enormous.

"Moreover," he said, "the problem may be worsening. Our preliminary inquiry indicates that a growing number of small businesses and individuals are taking advantage of Caribbean bank, tax haven and trading company secrecy to avoid paying taxes or to advance orther illegal pursuits."[120]

The Caribbean aid package was considered by Committees in both Houses during the 97th Congress, and while the House passed a version of it, the Senate failed to act. The package is expected to be reintroduced in the 98th Congress.

When the plan was considered by the House Ways and Means Committee shortly before the 97th Congress had adjourned, it made a major overhaul of the Administration's proposal for investment tax credits coupled with a rollback of secrecy laws. The Committee, implicitly recognizing that the economies of such countries as Bermuda and the Bahamas are high dependent upon American tourist dollars, took a carrot-and-stick approach. Instead of the investment tax credit—an incentive more attractive for American investors then for the Caribbean countries themselves—the Committee substituted an indirect incentive to Caribbean tourist countries: tax deductions for Americans attending conventions, seminars and similar meetings in any of the Caribbean countries and Bermuda. At present, Jamaica is the only Caribbean country where the convention deduction applies; as part of its 1981 agreement with the U.S. in which it was granted favorable convention treatment, Jamaica "made substantial concessions in terms of a far reaching anti-treaty shopping provision, notes promising broad exchanges of information, and a promise to negotiate a mutual assistance treaty concerning criminal matters generally," according to the Committee's report on the revised legislation. As for Bermuda, it is not one of the potentially eligible countries listed in the CBI legislation and was specifically added in the Committee report as a potential beneficiary of favorable convention treatment.

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[117] Hearings, House Ways and Means Trade Subcommittee, March 17, 1983.
[118] Ibid.
[119] PSI press release, March 22, 1982.
[120] Ibid.

Tied to the offer of favorable treatment, however, is the requirement that before any tax-deductible convention opens, the host country must have in force an agreement with the United States to exchange tax information. But no ordinary exchange agreement is contemplated. On the contrary, such agreements would approach the level of mutual assistance treaties insofar as tax matters are concerned.

The Ways and Means bill authorizes the Secretary of the Treasury to negotiate and conclude bilateral or multilateral agreements which must:

> Provide, on a reciprocal basis, for "information relating to U.S. tax matters to be made available to persons or authorities (including courts and administrative bodies) involved in the administration of U.S. taxes (including an assessment of taxes and prosecution in respect of taxes) or oversight of the administration of such taxes (a role of this Committee and of the General Accounting Office) or in the determination of appeals in respect of such taxes."
>
> "Require production of information notwithstanding local rules requiring secrecy about such information as to the ownership of bank accounts, trusts or bearer shares. In this respect, the agreements contemplated by the bill may go beyond the exchange of information articles of some U.S. tax treaties, which may defer to local secrecy laws."
>
> Require that information obtained "be usable as evidence in court"— that is, if request, "in the form of depositions of witnesses and authenticated copies of unedited original documents (including papers, statements, records, accounts and writings) . . ."

The Committee bill also wrote in a non-waivable, mandatory consideration for the President to make in determining whether a country may participate in the CBI program. It must be "a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of U.S. citizens."

The Committee report made these other observations:

> Under present law, the United States had difficulty in obtaining information to enforce its tax laws when transactions occur (or when information is located) overseas.

> The United States has entered into a network of income tax treaties that provide for exchanges of information to enable the United States and its treaty partner to enforce the tax laws which are covered by the treaty. However, the exchange of information articles in some treaties are not satisfactory, because they do not affect local laws protecting disclosure of certain information, such as information regarding the ownership of bank accounts or the beneficial owners of trusts. Moreover, the United States has treaties with few Caribbean countries, in part because some of those countries do not generally impose income taxes.
>
> . . . The Committee recognizes that some Caribbean Basin countries have been used by persons who seek to evade or avoid U.S. taxes. The Committee believes that the favorable convention treatment should be available only to those countries which are willing to assist the United States in enforcing its tax laws. Accordingly, the convention deduction is made available only for conventions in a country that enters into an exchange of information agreement with the United States.

VIII. SUMMARY AND SUGGESTIONS

Offshore havens are a critical element in facilitating criminal activity in the U.S. today. Havens, because they offer secrecy, and often, opportunities for further, uncontrolled criminal activity, are used as support bases for further criminality, for example, fraud perpetrated worldwide through banks and registered companies. The use of havens represents the business side of crime since it involves entrepreneurial judgment, attorneys, banks, accountants and investment managers. The understanding of offshore crime and possible measures for prevention requires attention to matters of geography, economics, international law, professional conduct, and the operation of international business institutions.

No single U.S. institution or agency has adequately considered these various facets of the problem.

Since the offshore havens are an aspect of the roughly $2 trillion Eurocurrency market, they are of immense importance in legitimate world trade and governmental financing. But the expanding use of these Euromarket facilities represents the rapid growth of international trade and banking generally: There is no axiomatic nexus between the Euromarket and off-shore secrecy. Indeed, major U.S. based banks told PSI that the secrecy accorded their Euromarket transactions in, say, the Bahamas, is *not* a factor in their decision to book deposits. Their plaintive cries that cut backs or abandonment of secrecy laws would wreck havoc on the legitimate banking establishment are simply overblown or not true.

In the meantime, internationalization of the business aspects of crime is continuing. Without question much crime is growing dramatically, as seen, for example, PSI's own studies of narcotics trafficking and fraud. The use of havens is also an aspect of the growth, in the U.S. and abroad, of underground economies which include both legal production of goods and services to illicit sectors.

It is generally held that both in the U.S. and Europe this unreported economic activity is expanding rapidly. It is designed to avoid regulation and taxation and thus criminal and civil sanctions. Of course, absence of regulation and legal tax avoidance, are equivalent advantages of the Euromarket itself. But a distinction has to be made not only domestically but in the minds of those who control haven governments and economics.

There are no reliable estimates for either the underground economy or for funds exported therefrom. There are criminological "dark numbers." Current estimates, each intelligently, ardently disputed, would range for the U.S. underground economy in 1982 from a minimum of $70 billion to a probably ridiculous upper limit of $900 billion. A mid-range figure is $330 billion. What portion of any estimate in this range is composed of criminally-generated funds is likewise unknown. Disputed estimates range from 8 percent to 33 percent. One recently proposed, neverless an economic model's fiction, is $110 billion.

Upper annual limits for U.S. funds exported, so calculated, are between $9 and $43 billion. A lower limit is set by figures actually produced as a result of criminal, SEC civil, or tax investigations, or other reports of seizures (e.g., Customs), or documented activities (corporate declarations to SEC under amnesty provisions). Unfortunately, there exists no central record of cases with offshore aspects. One does not err in the direction of radicalism if one calculates that at least $2 billion a year surfaces in such official reports. That sets a far too low bottom limit on funds exported in association with criminality and/or tax evasion.

As to what constitutes an offshore haven, or what jurisdictions are offshore havens, definition and identification vary for the concept is relative to the tax and criminal laws or any one nation vis-a-vis another. In essense, a haven is a sanctuary where money, persons and institutions may operate independent of, and unregulated by, laws or practices common in other (home) jurisdictions, to their own advantage and sometimes to the relative disadvantage of that home jurisdiction. A compilation of such jurisdictions numbers over 80. For purposes of a U.S. interest in associated criminality, a haven may be described as an autonomous municipality with laws or practices allowing the establishment and function of banks and/or registered companies.

Observation of a sample of havens of offshore financial centers shows that they can serve a variety of business and governmental purposes. Each haven differs somewhat from others in its own socio-political condition and the specialized services it offers. Competition among havens is keen; a competitive edge could amount to a huge proportion of a haven's budget.

Havens tend to see their economic development as substantially dependent upon continuing and, (hopefully) expanding their range of financial services. Rationally or irrationally they strongly resist efforts to achieve conformity, such as in increased cooperation in criminal law matters. Tax law enforcement cooperation is seen as out of the question everywhere.

In less advanced jurisdictions, the operations of offshore banks and companies are essentially out of the control of local law and lack any practical supervision. In such locales informal practices rule, including influences elsewhere regarded as improper or corrupt. Hence, political, professional and business leaders can enjoy personal gain through beneficial relationships with individuals whose criminality may not only be defined by the laws of major states, but by local law as well.

In those havens which are, in fact, better characterized as financial centers of major nations (e.g., United Kingdom, Switzerland), secrecy is of less consequence and activities are not imbedded in corrupt informal practices. Nevertheless, philosophies of taxation can markedly differ from those of the United States, so that even under ideal conditions, exchange of information in tax matters does not occur. Switzerland or Bermuda, for example, are characterized by cooperation in criminal matters involving bank and company affairs but not in providing tax relevant data. At the other extreme, the Caymans and Panama are almost entirely uncooperative. The United States-Swiss Treaty for Mutual Assistance in Criminal Matters may be taken as a model for cooperation. Swiss internal requirements under the Convention on Diligence, which obligates banks, lawyers, trust supervisors and others to ascertain the origin of funds received for deposit and management if a further model. Indeed, it is a code actually designed to frustrate the flow of criminal monies. It is, however, by no means enthusiastically endorsed by all Swiss bankers or are we able to ascertain its effectiveness. At this stage it remains a theoretical step forward.

Our review of over 100 identified cases with U.S. criminal aspects serves to prove that sophisticated offshore facilities do benefit the criminal user. Schemes employed tend to be complex and typically involve several jurisdictions ("layering") and institutions, and dependent upon assistance by witting or consciously disinterested haven professionals and bankers.

Thus, we take it as demonstrated, by federal and state prosecutors, SEC, IRS, Comptroller, DEA, FBI, Customs, Postal Inspection Service, and others, as well as by the growing body of data and theory on the underground economy and related offshore schemes as set forth here, that criminal uses of offshore services are of great consequence to the United States. Defined monetarily, the present best guess for loss is the conservative mid-range figure form the model of Stanford professors Blum and Kaplan of about $25 billion annually. Considered in terms of the magnitude of successful criminality via the offshores, it follows that the criminal justice system of the United States simply cannot cope with offshore offenders. Thus, if society is to maintain its commitment to crime prevention and control, it must seek to reduce the criminal opportunities, including egregious tax evasion, that depend upon offshore haven bank, trust and company facilities.

Necessary perspectives

Assuming commitment, there are certain important principles which must be kept in mind before taking action:

(1) Do not expect any massive change in the criminal use of the offshores as long as the U.S. itself facilities their criminal use. That is, U.S. banks accept "dirty money", evade taxes in branch jurisdictions, and fail to file currency reports while, in

the meantime, the country's underground economy continues to grow;

(2) There is no one policy which the U.S. can consider applying. The diversity of havens, dictates that there can be diversity in response. When action is focused on a haven, the approach must arise from a realistic appraisal of its political, economic and social circumstances, its resources and developmental capabilities. When a haven is both important and uncooperative one must calculate the costs involved. Typically responses will include, for the haven at least, some economic disruption, with the ever-present threat of retaliatory political realignment and consequential potential damage to U.S. interests in military security, political stability, and trading advantage.

(3) Attention cannot be entirely external. Effective governmental action vis-a-vis the offshores requires revisions within and among agencies in the U.S. government.

(4) A final principle, is that almost any policy action undertaken toward the offshores would be of significant concern to the country affected. As noted, it would, at the very least, affect interrelated political-social-economic-criminal activities in the haven, but it could also affect the Euromarket, impinge on the interests of huge international banks, and bear on diverse matters of U.S. interest. Parochialism is out of the question for the competent offshore haven policy planner.

Coercive sanctions

The Gordon report (1981) sets forth clearly sanctions U.S. agencies might consider as proposals to be submitted to the Congress, or when possible as internal administrative revisions. Such sanctions would be applied to any jurisdiction declared a non-cooperation offshore haven, with cooperation defined as refusal, or consistent failures in fact, to provide information on request when such information is relevant to a criminal case under investigation or prosecution. Examples from the Gordon report include prohibiting U.S. airlines from flying to the haven, prohibiting U.S. banks from conducting business in any haven country (thus denying branch subsidies), withholding on all dividends and interest paid to haven residents at a rate of 59 percent, and taxing all loans from havens as direct income to any U.S. borrower.

Other sanctions being considered, whether informally aired or more formally studied, include restricting air traffic agreements to deny foreign airlines direct flights between a U.S. port and the haven; terminating Customs pre-clearance arrangements (i.e., closing U.S. customs posts in haven airports); requiring exist visas for all U.S. travelers to havens; restricting the voting rights of all outstanding U.S. common stock registereed in the name of residents (company, nominee, etc.) in the haven; denial of the right to purchase any U.S. asset if not a "qualified entity" where qualified status is granted only where there is cooperation in information exchange; denial of any tax deduction for any travel to the haven or for any alleged business expense connected with transactions with the haven; denial of any international bank with a branch or subsidiary in the haven the privilege of the maintaining branches or subsidiaries in the U.S.; blocking accounts held in the U.S. by any international bank refusing to provide data on its haven branch depositor in a U.S. criminal case; under the Bank Secrecy Act requiring the reporting of any financial transaction between U.S. persons and haven entities; disallowing any advantageous tax treatment to income received by a controlled foreign corporation qualifying as a class B bank in the haven and requiring all persons resident in the haven to apply for an advance visa for each and every visit to the U.S.

Clearly these proposals constitute economic warfare. Some would create an uproar with our allies and trading partners whose airlines, banks, or treaty-shopping U.S. investors would be disadvantageously affected; some would create outrage among U.S. corporations disadvantaged in competition with foreign concerns; some are more feasible. What must be realized is that the very nature of extreme propositions is to be taken as symptomatic of mood. Among some enforcement personnel and policy makers the mood is one of determination that the U.S. interest must advanced, and that, given a perceived haven stance of intransigent, inflexible self-interest, the U.S. must act to counter the criminal advantage even if such action incurs collateral costs.

Is the United States itself culpable?

From the foregoing country sketches, it is apparent that U.S. demands on foreign jurisdictions for cooperation are not without skeptical responses. Criticism of U.S. "self-rightousness" stems not only from haven authorities protecting their own self-interest but also from allied nations suffering some of the same problems as does the U.S. with respect to money fleeing abroad. Indeed "neutral" experts working in international organizations point to shortcomings in U.S. self-policing effort.

Foremost among these criticisms are the following:

(a) The U.S. does not sufficiently prevent crime or enforce its own laws. Granting that offshore documentation is often necessary to identify offenders, it is argued that even financial crimes in the U.S. usually do not involve offshore assets and records. Many, particularly the Colombians, Panamanians and Caymanians argue that attention to the offshore phenomenon is merely diverting attention from the pressing social need within the U.S. to reform its citizens' moral conduct, and to reform its own laws.

The U.S. banking system is not entirely protected through licensing and federal supervision from bad luck, poor judgment or buccaneers. The recent episode involving Frank Sindona and the Franklin National Bank is a case point.

Consider that as of August 1982 there were 277 "problem" national banks identified by the Comptroller of the Currency, and over 18 months—1981 through half of 1982—there were 34 failures among 14,000 U.S. commercial banks. The Comptroller reasonably contends that failures are inevitable in a free market system.[121]

On the other hand, the inspection system itself is open to criticism. That is, even U.S. regulation has not been unfailing. Consider the Penn Square Bank which failed in mid-1982. In early April of

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[121] "Q. & A.: C.T. Conover—U.S. Comptroller Finds Bank System 'Healthy," New York Times, August 23, 1982; The Banking Regulator, October 21, 1982.

1980 bank examiners knew of severe problems, although they did not group it among the "problem" banks. Congressman Gorman of the House Banking Committee said, "Public monies were used to examine the bank . . . but the public didn't receive the results of the work for which they paid." Congressman McKinney of the same committee, upon his review of the regulatory process, commented that it was "a system that just stinks." The traditional close-to-the-chest relationship between federal authorities and bank management, in violation of the law and at risk of insolvency, can hardly be said to have worked to protect the public interest.

(b) As the consultant to the Subcommittee stated, one argument sometimes heard is that the U.S. is primarily responsible for the Euromarket and has exported inflated dollars to expand the funds in the market. Were the U.S. to put its economic house in order, curbing current high balance of payments deficits the market would shrink, as would the facilities in it. Were other uses of the external dollar also to be limited, as for example its role as a national or quasi-national currency (e.g., Liberia, Panama, much of the Caribbean), there would be further diminution of Eurocurrencies, and the importance of havens.

Indeed, were the U.S. to take a radical approach toward control of Euromarket activities affecting the dollar and its export, it would have to invoke currency controls. Such controls would impede trade, but would make great inroads on major movements, via ordinary bank transactions, of illicit funds abroad. Since the U.S. is no doubt unwilling to impose upon itself these restrictions, and their costs, the need to regulate presently unregulated Euromarket facilities will continue.

(c) The U.S. has made its demands before it has presented a convincing body of fact with respect to the importance of offshore criminal abuses. A few cases, however important to frustrated law enforcement personnel do not justify harsh threats, as in the IRS' Gordon report, or public denunciations of haven practices. The U.S. has not specifically demonstrated that it suffers from the limited criminality/tax evasion fostered by havens. It has not shown that the amount of loss is such as to justify even economically, let alone politically, the inevitable costs of any extraordinary measures to be taken vis-a-vis the offshores. The U.S. has not made a statistical, economical, or even political case sufficient to interest, let alone arouse or convince, officials in jurisdictions (such as Panama, Bahamas, Caymans) which are accused of complicity in laundering or in thwarting U.S. enforcement interests.

(d) The U.S. has hardly tested traditional mechanisms for negotiating troublesome matters. It has not pressed for bilateral agreements, nor even suggested a network of treaties or any international authority to deal with information exchange needs. The Swiss Treaty may indeed be a model, but some Swiss officials say it is underemployed by the U.S. and, in parallel extradition cases, loaded with unreasonable evidentiary demands. At the operational level the U.S. has not learned foreign procedures for handling information requests; it has inadequate coordination among agencies, institutional memory, and teaching apparatus within the federal government. Indeed, haven jurisdictions contend that the average prosecutor does not know who to contact abroad, what evidence to submit, what procedures to follow. Furthermore, when agreements do exist, the two-way street can turn out to be either full of potholes or barriers. U.S. agencies do not respond efficiently, Interpol does not work, delay in U.S. response to foreign requests is the rule, and such delays often lead to the same sort of serious police and judicial problems in requesting jurisdictions as are said to occur here.

(e) The United States tends too quickly to brandish the stick, forgetting the carrot. Law enforcement officials may be particularly guilty of such posturing. In parallel situations, compromise is the rule. At present the U.S., is prepared to use the stick and has forgotten that is but a part of the staging for the serious, private negotiation.

IX. RECOMMENDATIONS

The efforts of the Subcommittee over the last two years have not been limited to illustrating the problem, but have examined possible solutions to the problem. Through an exhaustive review of existing law, interviews with law enforcement officials, as well as criminals who have used offshore banks, and surveys of leading experts in this field, the Permanent Subcommittee on Investigations has assembled recommendations which address the major abuses of offshore banking.

Legislative recommendations

1. Amend IMF or AID legislation to allow for U.S. technical assistance in bank supervision to offshore jurisdictions.
2. Enact legislation to expand the authority of Customs officials to make exit searches for unlawful currency export. The Customs Service should be allowed outbound seizure authority under Title 31 for assets and conveyance used in the violation.
3. Amend the Financial Privacy Act to enhance the reporting responsibilities of bank officials regarding unusual account activity.
4. Amend the Privacy Act to allow the Comptroller of the Currency to notify U.S. banks of the names of offshore banks and companies against whom complaints of fraud are pending.
5. Expand the International Banking Act of 1978 to require more detailed and inclusive information to be filed by U.S. representative offices of foreign banks.
6. Amend the federal rules of evidence to facilitate the admissability of material obtained from competent foreign authorities.
7. Legislation is needed to allow such agencies as the SEC to obtain information on foreign accounts and to police the internationalized U.S. captial markets in light of foreign blockage and secrecy laws, which prevent the agencies from obtaining vital information.
8. Violations of the Bank Secrecy Act (Title 31) should be included in the requisite violations used to obtain permission for electronic surveillance under 18 U.S.C. 2510 *et. seq.*
9. Congress could impose sanctions on havens which refuse to cooperate in criminal matters by:

    Taking loans made in havens as direct income, Requiring strict visa and Customs procedures for haven travelers, including a haven traveler exit requirement for each U.S. visit;

Deny tax deductions for haven travel and business expenses; and

Deny U.S. banking privileges to foreign headquartered international banks for failure to provide information during criminal investigations or prosecutions.

Internal Revenue Sevice should

1. Provide preferential tax treatment for conventions and travel in haven countries that cooperate with the U.S. in this area to offset the loss of licensing bank fees from unregulated entities in the haven country.
2. Deny tax advantages for any controlled foreign corporation qualifying as a class B bank in a haven country to eliminate incentives for the creation of these banks.
3. Undertake more research into the underground economy and taxpayer practices in order to improve the understanding of the size, nature and impact of the underground economy.
4. Consider requiring additional taxpayer information with respect to foreign transactions to facilitate civil and criminal investigation of possible illicit offshore activities.
5. Require an information return to be filed when a U. S. person acquires an interest in a foreign partnership, foundation or trust.
6. Use currently available data from U. S. correspondent banks to obtain information on tax evaders and others using haven banks.

Department of State should

1. Fill any vacancies at ambassador and other levels in haven countries to demonstrate U. S. interest and respect for local governments and to enhance diplomatic ties.
2. Expand existing model mutual assistance treaties to provide that a country discovering an internal criminal act affecting the other country will provide authorities in the affected country with its evidence. Existing treaties should also be expanded to provide for mutual assistance in civil cases arising in conjunction with criminal prosecutions.
3. Consider undertaking requisite diplomatic initiatives to establish an Eastern Caribbean Currency Authority which would greatly enhance bank supervision and reduce bank secrecy.
4. Work with the Justice Department in attempting to detail skilled enforcement personnel, agreed to confidentiality in noncriminal matters, to haven authorities.
5. Consider making it a condition for U. S. aid that corporate agents in havens be made responsibile under local law for a company's offshore activities.

Department of Justice should

1. Provide evidence of the illegal uses of offshore banks to haven jurisdictions in order to persuade haven citizens and authorities that U.S. charges of illegal use of havens are supported by facts.
2. U.S. officials should promptly fill reciprocal requests for information from haven countries so that they will be more likely to reciprocate U.S. requests in a timely and complete manner.
3. Cooperate in the investigation and prosecution of U.S. citizens who violate the laws of havens such as the Bahamas.

Department of Treasury should

1. Work with the Federal Reserve Board to develop a better understanding of the financial significance and use of currency repatriation data as well as information about foreign depositors' currency deposits.
2. Revise U.S. bank examining practices for the better protection of depositors, including the requirement of domestic application for all U.S. banks' offshore operations.

Drug Enforcement Administration

1. The DEA budget should include authorization for an expanded cadre of agents trained in accounting and bank matters to work internationally, including in haven countries.
2. The DEA should greatly enhance its lagging capacity to conduct complex financial investigations.

U.S. Customs Service (see also legislative recommendations)

1. The Customs Service budget should include adequate funds for informant rewards to encourage information on currency related violations.

General

1. There should be greater coordination of U.S. agencies involved in offshore criminal matters to ensure adequate training, communication, and the collection and distribution of information.
2. U.S. law enforcement officials should agree upon and then educate their staffs as to the procedures, both formal and informal, for obtaining information in havens.
3. An international study should be commissioned to plan for improved cooperation in criminal use of haven countries and suggest joint policies concerning the offshore criminal problem.
4. International intelligence gathering and banking agency computer capacities should be increased to allow for screening of applicants for banking licenses and corporate registrations.
5. U.S. bankers should establish a voluntary self-policing code to set forth minimal requirements and procedures for accepting unusual deposits. Secrecy waivers should be incorporated into offshore trust and account contracts with banks' clients.
6. International banks operating commercial offices in havens should waive secrecy requirements by offshore bank managers whereever possible to discourage corrupt managers from concealing their own improper actions.

7. U.S. law enforcement agencies should circulate lists of complaints and stolen securities to offshore bankers to provide the opportunity for these bankers to use available data on illegal activity to screen accounts.

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Foreign Authorities

Antigua: Mr. St. Luce, Minister of Finance, Paul Byrnes, charge d'affaires in U.S. Embassy, Antigua, Attorney General Keith Bord, Mr. Mathias, Permanent Secretary of Finance, Herron Edwards, Commissioner of Inland Revenue, Mr. Ambrose, Financial Secretary.

Bahamas: Attorney General Adderly, Andrew Antippis, charge d'affaires, U.S. Embassy, Tom Dowd, FBI special agent, Embassy, Sandy Hodapp, assistant revenue service representative, IRS, Embassy, Don Fleming, former head of the Nova Scotia Bank in Nassau, former deputy finance minister of Canada, author of the Bahamas secrecy act, Genius Wells, financial consultant and former manager of a Nova Scotia Bank branch in the Bahamas, Andrew Miller, International Monetary Fund and chief auditor of the Bahamas Central Bank, G. Jeffrey Johnstone, Attorney and President of the Bahamian Bar, Grafton Ifill, Director of Criminal Investigation Division, Bahamian Police, Dick Belt, Counsel at the U.S. Embassy, Mr. Davis, Superintendent of Banks.

Bermuda: Dr. Charles Collus, President of the Bermuda Chamber of Commerce, Dr. Roger Davidson, past President of the Chamber, Merlyn Trued, managing director of the Monetary Authority, former U.S. Assistant Secretary of the Treasury, Colin Miles, Assistant Financial Secretary, Economics Ministry of Finance, Norbert Bowers, IRS overseas office representative, F. C. Bean, Commissioner of the Bermuda Police, John Sheehy, Superintendent of the Criminal Investigation Division, Max Friedersdorf, U.S. Counsel General, Mr. Ward, Solicitor General.

Montserrat: Mr. Sterritt, Finance Officer, W. A. Ferguson, Financial Secretary, Governor Dale, David Brandt, lawyer in Montserrat for Jerome Schnieder of WFI, Ken Castle, a principal permanent secretary in the Chief Minister's government, John Osborne, Chief Minister, H. G. Wilson, Attorney General, Police Commissioner Thomas, Mr. Weeks, former Attorney General, Chessel Jacobs, Managing Director, East Caribbean Currency Authority (St. Kitts).

Panama: Melvin Blake, Chargé D'affaires, U.S. Embassy, Peter Becker, Economics Officer, U.S. Embassy, Rene Diaz, President of the Panamian Bankers Association, Mario de Diego, Director of the National Banking Commission, Mr. Arosemena, President of the National Bank of Panama, Georgeanna de Perez, Director of Internal Commerce in the Ministry of Commerce, Leonard Williams, DEA Chief in Panama, Mr. Miranda, Attorney General, Howard Gross, U.S. Consul General.

Netherlands Antilles (interviews in U.S.): Julio Henriques, Netherlands Antilles attaché, Dutch Embassy, Washington, Robert Cole, Washington attorney for Netherlands Antilles, Egbert Jonker, Dutch attorney specializing in Netherlands Antilles tax law.

Foreign agencies: Swiss Federal Banking Commission, United Kingdom Foreign and Commonwealth Office, East Caribbean Currency Authority.

Banks: Security Pacific Bank, Barclays International Bank, Swiss National Bank, Bank of America, Chase Manhattan, National Bank of Washington, Southeast First National Bank of Miami, Riggs National Bank, Bank of England, First Virginia Bank, Oxford Bank, Turks & Caicos.

Corporations: Swift Bank Message Service Company, McDermott International, Inc., Clearing House International Payment System, American Financial Resources.

Associations: Americans Bankers Association, New York Clearing House Association, National Automated Clearinghouse Association.

Other Individuals: Professor Harvey Dale, New York University, James Dixon, Stanley Galkin.

Persons Convicted of Schemes Using Offshore Facilities: Maurice Benjamin (worthless bank paper), Mike Burnett (worthless bank paper), Anthony Cavanaugh (worthless bank paper), Leaders of "The Company" (Narcotics ring), Harold Oldham (Narcotics trafficker), Rick Waggoner (Commodities Fraud), Bobby Howell (Commodities Fraud), Dan Sledd (Commodities Fraud), Ken Levin (Commodities Fraud).

Offshore Bank Brokers: Jerome Schneider (WFI Corporation) St. Vincents, Montserrat, Cayman, Northern Mariana, Nauru Charles Cranford, Anguilla, Costa Rica, Turks and Caicos, Gordon Noval, Anguilla, Turks and Caicos, Richard Biggles, Anguilla, William Burke, Cook Islands.

Clients of Bank Brokers: 23 clients who never purchased a bank 12 clients who are former bank owners, 20 clients who still own banks.

Individuals who held accounts at Oxford bank—Turks and Caicos: 17 account holders were contacted.

II. CATALOG OF U.S. CASES INVOLVING BANK OR COMMERCIAL SECRECY

OFFSHORE BANKING: CASES

Case Name	Type of Case	Foreign Country Involved	Date	Court
	I. Laundering or Secreting Illegally Profits			
In the Matter of Arawak Trust Co.	laundering kickbacks through foreign corporations	Cayman Islands	1980	DCEDNY
Bank Saderat (Iran) v. Marashi	misappropriating bank funds through foreign trust	Liechtenstein	1982	Sup.Ct.LA
Dennis Carlson	laundering drug profits through foreign entities	Cayman Islands, Liechtenstein		IRS, Western Office
James Cross	secreting embezzled funds in foreign accounts	Bermuda		IRS, Southwest Office
Francisco Fernandez & Guillermo Hernandez	laundering drug profits through foreign accounts	Colombia, Cayman Islands		IRS, Southeast Office
Rogelio A. Fernandez	concealing source of drug profits through foreign contract	Mexico		IRS, Southeast Office
Firestone Rubber, Inc.	secreting legal and illegal profits through foreign accounts	Switzerland		IRS, Central Office
John D. Fox	laundering drug profits through foreign accounts	Equador		IRS, Southeast Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
Eduardo Garcia & Alfredo Garcia	secreting illegally obtained funds in foreign accounts	Panama, Puerto Rico		IRS, Southeast Office
Michael J. Grassi	laundering drug profits through foreign accounts	Cayman Islands		IRS, Southeast Office
Hughes Tool Co. v. Meier	secreting diverted corporate funds in foreign accounts	Netherland Antilles	1977	DCUtah
Ostrer v. U.S.	laundering embezzled funds through foreign casinos	Bahamas	1977	DCSDNY
People v. Wilson	secreting pornography profits in foreign accounts	Cayman Islands Switzerland	1982	Sup.Ct. LA
Carlos R. Porro	laundering drug profits through foreign accounts	Several offshore countries		IRS Southeast Office
Derek Price	laundering drug profits through foreign accounts	Cayman Islands		IRS Southeast Office
SEC v. Certain Unknown Purchasers... of Santa Fe Stock, SEC v. Martin	secreting securities fraud profits in foreign accounts	Switzerland	1982	DCSDNY; DCWDWash
SEC v. Zolp	secreting securities fraud profits in foreign accounts	Bahamas	1982	DCSDCal
U.S. v. Beltempo	laundering drug profits through foreign accounts	Switzerland	1982	2nd Cir.

Case Name	Type of Case	Foreign Country Involved	Year	Court
U.S. v. Dichne	secreting embezzled funds in foreign accounts	Switzerland	1980	2nd Cir.
U.S. v. DiStefano	laundering kickbacks through foreign accounts	Bahamas	1973	DCMDFla
U.S. v. Eimers	laundering prostitution profits through foreign accounts	Bahamas	1982	DCSDFla
U.S. v. Enstam	laundering drug profits through foreign accounts	Cayman Islands	1980	5th Cir.
U.S. v. Erwin	secreting embezzled funds in foreign account	Cayman Islands	1982	Sup Ct. Riverside County
U.S. v. Friedland	secreting kickbacks in foreign accounts	Cayman Islands, Switzerland	1981	3rd Cir.
U.S. v. Garfield Bank	laundering drug profits through U.S. accounts	Bermuda, Panama, Liberia	1981	DCCDCal.
U.S. v. Govern	laundering drug profits through U.S. accounts	Cayman Islands, Netherland Antilles	1982	DCMDFla.
U.S. v. The Great American Bank	laundering drug profits through U.S. accounts, secreting drug profits in foreign accounts	Switzerland, Panama, Peru	1982	DCSDFla.
U.S. v. Long	laundering drug profits through foreign accounts	Bahamas		DCWDPa.

Case Name	Type of Case	Foreign Country Involved	Date	Court
U.S. v. Rittenberg	laundering drug profits through foreign accounts	Liechtenstein, Switzerland, Bahamas	1980	DCSDCal
U.S. v. Sand	laundering drug profits through U.S. accounts	Bahamas	1976	9th Cir.
U.S. v. Scotto	laundering kickbacks through foreign and U.S. accounts	Switzerland	1980	2nd Cir.
U.S. v. Sonal Corp.	laundering drug profits through U.S. accounts	Columbia	1981	DCSDFla
U.S. v. Sterling	laundering drug profits through foreign accounts	Switzerland, Liechtenstein, Cayman Islands	1982	DCWDWash
U.S. v. Toombs	laundering drug profits through foreign corporations	Cayman Islands Bahamas	1982	DCEDVa.
Chester Zabik	secreting kickbacks in foreign accounts	Switzerland		IRS Central Office

II. Secreting Legitimate Assets for Illegitimate Purposes

Case Name	Type of Case	Foreign Country Involved	Date	Court
Roy G. Anderson	secreting funds in foreign accounts to facilitate tax evasion	Bermuda		IRS, Western Office
John Berkey and Phillip Weinstein	diverting corporate receipts to foreign accounts	Belgium		IRS Southeast Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
Bronston v. United States	secreting assets from creditors in foreign accounts	Switzerland	1973	U.S.S.C
CBS Imports, Inc.	using foreign subsidiary to make illegal payoffs	Hong Kong		IRS, Mid-Atlantic Office
Victor M. Divivo	diverting corporate receipts, secreting in foreign accounts	Switzerland		IRS Southwest Office
Ralph D. Franks	secreting funds in foreign corporations to facilitate tax evasion	Bermuda		IRS Southwest Office
Margarito Garza	concealing unreported receipts through foreign bond purchases	Mexico		IRS Midwest Office
Don H. Lloyd	secreting funds in foreign entities to facilitate tax evasion	Cayman Islands		IRS Southwest Office
Phillips Petroleum, Inc.	secreting funds for illegal payoffs in foreign accounts	Panama		IRS Southeast Office
William I. Rials and Stanley E. Galkin	diverting corporate receipts, secreting in foreign accounts	Cayman Islands	-	IRS Southeast Office
Paul L. Rioux	secreting funds in foreign accounts to facilitate tax evasion	Canada		IRS Mid-Atlantic Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
Schlensky v. Dorsey	secreting corporate funds for illegal campaign contributions in foreign subsidiary's accounts	Bahamas	1978	3rd Cir.
In the Matter of Harry L. Sears	secreting corporate funds for illegal campaign contributions in foreign account	Bahamas	1977	DCNJ
Charles W. Sizemore	secreting funds in foreign account to facilitate tax evasion	Bahamas		IRS Southwest Office
Frank J. Tuseck	secreting funds in foreign account to facilitate tax evasion	Cayman Islands		IRS Mid Atlantic Office
U.S. v. Aita	secreting funds in U.S. accounts to facilitate tax evasion	Italy	1982	DCNJ
U.S. v. Baskes	secreting funds in foreign corporations' accounts to facilitate tax evasion	Cayman Islands	1980	7th Cir.
U.S. v. Carver (Interconex)	secreting funds for kickbacks in foreign accounts	Liberia, Switzerland, Liechtenstein, Cayman Islands	1981	DCDC
U.S. v. Crawford	illegally bribing foreign officials for business purposes through foreign accounts	Mexico	1982	DCSDTex.

Case Name	Type of Case	Foreign Country Involved	Date	Court
U.S. v. Hajecate	secreting funds in foreign accounts to facilitate tax evasion	Cayman Islands	1982	5th Cir.
U.S. v. McPartlin	illegally bribing city officials through foreign accounts	Liechtenstein, Switzerland	1979	7th Cir.
U.S. v. Phillips Petroleum Company	secreting funds for illegal campaign contributions in foreign bank accounts	Switzerland	1977	DCNDOkl

III. Use of Offshore and Foreign Entities as an Integral Part of an Overall Criminal Scheme

Case Name	Type of Case	Foreign Country Involved	Date	Court
CFTC v. U.S. Metals Depository	conducting boilerroom operations through foreign bank	Luxembourg	1979	2nd Cir.
Oran W. Cotton	deducting costs, eventually returned through foreign accounts	Cayman Islands		IRS Southwest Office
Karl L. Dahlstrom	participating in sham "double trusts" in foreign countries	Belize, Turks & Caicos Islands		IRS. Western Office
Billie Sol Estes	concealing U.S. transactions through foreign accounts	Lietchenstein		IRS Southwest Office
Calvin Eisenberg	deducting costs, eventually returned to foreign account through foreign entity	Bahamas		IRS Western Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
Robert Falvo & Richard D. Smith	taking false deductions involving foreign tax shelters	Columbia		IRS Southeast Office
Fidenas v. Compagnie International Pour L'Informatique CII, Honeywell Bull, S.A.	using foreign corporations to defraud	Bahamas, Switzerland	1979	2nd Cir.
John S. Howell	secreting funds in foreign accounts to facilitate tax evasion	Belize, Puerto Rico		IRS Southwest Office
IIT, An International Investment Trust v. Cornfield	using foreign subsidiary to defraud	Canada, Panama	1980	2nd Cir.
Index Fund Inc., v. Hagopian	using foreign mutual fund to commit securities fraud	Bahamas	1976	2nd Cir.
Schact v. McCollum	accepting kickbacks through foreign entities	Lebanon, Mexico		IRS Southwest Office
Lea J. Marks v. Harold J. Marks	taking false deductions involving foreign tax shelters	Liechtenstein, Switzerland, Cayman Islands		IRS, Southeast Office
James M. Moran	taking false deductions involving foreign corporations	Bahamas, Cayman Islands		IRS Southeast Office
Benjamin Mudd	concealing foreign account	Switzerland		IRS National Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
New York County v. Firestone	using foreign account to establish fraudulent tax shelters	Bahamas	1982	NYCty
Virgil Ogletree	secreting property ownership in foreign country to evade taxes	Bahamas		IRS Central Office
Gerald Rogers	participating in fraudulent tax shelters involving foreign country	Panama		IRS Western Office
Leonard Rosen	secreting funds in foreign accounts to facilitate tax evasion	Bahamas		IRS Western Office
Robert M. Saunders	taking false deductions involving foreign entity	England		IRS Central Office
SEC v. Bank of Credit and Commerce International, S.A.	using foreign entities to violate securities regulations	Kuwait, Saudi Arabia, Luxembourg	1978	DCDC
SEC v. Banque de Paris et des Pays-Bas (Suisse)	using foreign bank to violate securities regulations	Switzerland	1977	DCDC
SEC v. Cayman Island Reinsurance Corp., Ltd.	using foreign corporation to violate securities regulations	Cayman Islands	1982	DCSDNY
SEC v. Diplomat National Bank	trading in violation of securites regulations on behalf of foreign nationals	Korea	1977	DCDC
SEC v. Everest Management Corp.	using foreign accounts to commit securities fraud	Switzerland	1971	DCSDNY
SEC v. General Refractories Co.	using foreign corporations to commit securities fraud	several European countries	1975	DCDC

Case Name	Type of Case	Foreign Country Involved	Date	Court
SEC v. Kasser	using foreign corporations to commit securities fraud	Canada, Switzerland	1977	3rd Cir.
SEC v. Katy Industries	using foreign subsidiary to commit securities fraud and make illegal payoffs	Cayman Islands	1978	DCNDIll.
SEC v. Vesco	using foreign corporations to commit securities fraud	Bahamas, Luxembourg Costa Rica	1972	DCSDNY
State of Arizona v. Williams	using foreign corporations to commit securities fraud and evade taxes	Panama, Montserrat Mexico	1981	Sup. Ct. Maricopa Cty.
U.S. v. Becker	using foreign banks to defraud investors	Bahamas	1978	5th Cir.
U.S. v. Brinlee	using foreign accounts to defraud	Antigua	1981	DCNDTex
U.S. v. Courtois	using foreign accounts to commit securities fraud	Bermuda, Bahamas Luxembourg, Switzerland	1982	DCSDNY
U.S. v. Crosby	using foreign banks to utter worthless checks	St. Vincent	1982	DCMass
U.S. v. Federbush	using foreign banks to defraud	St. Vincent	1980	9th Cir.
U.S. v. Firestone Rubber	using foreign subsidiary to circumvent U.S. regulations	Switzerland	1981	DCNDOhio
U.S. v. Jaeger	using foreign accounts to commit currency exchange fraud	Turks & Caicos Island	1979	DCSDNY

Case Name	Type of Case	Foreign Country Involved	Date	Court
U.S. v. Kelly	using foreign trust to commit securities fraud	Liechtenstein Switzerland	1965	2nd Cir.
U.S. v. Kelly	using foreign fund to defraud	Panama	1978	5th Cir.
U.S. v. Kilpatrick	using foreign banks and corporations to establish fraudulent tax shelters	Cayman Islands	1982	DCColo
U.S. v. Krown	using foreign banks to establish fraudulent tax shelters and defraud	St. Vincent	1980	DCColo
U.S. v. McDevitt	using foreign corporations to establish fraudulent tax shelters and defraud	Anguilla, Bahamas	1982	DCNDTex
U.S. v. McDonnell Douglas Corp.	using foreign corporations to bribe foreign officials	Guernsey Island, Bahamas Bermuda, Belgium	1979	DCDC
U.S. v. Newman	using foreign banks and trusts to commit securities fraud	Bermuda, Bahamas, Luxembourg, Switzerland	1981	2nd cir.
U.S. v. Osserman	using foreign banks to establish fraudulent tax shelters	Cayman Islands	1980	DCMass.
U.S. v. Palm State Bank	using foreign accounts to defraud and evade taxes	Cayman Islands	1982	DCMDFla
U.S. v. Parker	using foreign corporations to establish fraudulent tax shelters	Switzerland, Grand Cayman Italy, Germany	1981	DCColo

Case Name	Type of Case	Foreign Country Involved	Date	Court
U.S. v. Rodriquez	using foreign accounts to defraud	Antigua	1982	DCCDUtah
U.S. v. Sarault	using foreign banks to utter worthless checks	Bahamas	1982	DCRI
U.S. v. Twombly	using foreign corporations to bribe foreign officials	Bermuda, Puerto Rico	1980	DCNJ
U.S. v. Sindona	using foreign banks to commit securities fraud	Switzerland, Italy	1980	2nd Cir.
U.S. v. Vetco, Inc.	using foreign subsidiary to circumvent U.S. regulations	Switzerland	1981	9th Cir.
United States v. Whipple	using foreign corporations to establish fraudulent tax shelters	Cayman Islands, Andorra	1981	DCDUtah
United States v. Wolfson	using foreign bank to utter worthless checks	Bahamas	1971	DCDel.
United States v. Wolfson	using foreign bank to utter worthless checks	St. Vincent	1980	9th Cir.
Alfred I. Willett	concealing commodities fraud through foreign corporation	Libya		IRS Mid-Atlantic Office
Herbert M. Wolstencraft	aiding in false representations to IRS involving activities in foreign countries	Bahamas		IRS Central Office

Case Name	Type of Case	Foreign Country Involved	Date	Court
	IV. Issues Pertaining To Litigation			
In the matter of Arawak Trust Co.	complying with grand jury subpoena of foreign bank records	Cayman Islands	1980	DCEDNY
Application of Chase Manhattan Bank	complying with subpoena for bank records in light of possible violation of foreign law	Panama	1962	2nd Cir.
Ings v. Ferguson	complying with subpoena for bank records in light of possible foreign law violations	Canada	1960	2nd Cir.
Ryan v. Commission of Internal Revenue	complying with subpoena for bank records in light of possible foreign law violation	Switzerland	1975	7th Cir.
SEC v. Banca della Svizzera Italiano	complying with subpoena for bank records in light of possible foreign law violation	Switzerland	1981	DCSDNY
SEC v. Minas de Artemisa, S.A.	complying with subpoena for bank records in light of possible foreign law violation	Mexico	1945	9th Cir.
Societe Internatioanle Pour Participation Industrielle v. Rogers	complying with subpoena for bank records in light of possible foreign law violations	Switzerland	1958	USSC

Case Name	Type of Case	Foreign Country Involved	Date	Court
Trade Development Bank v. Continental Insurance Co.	mandating secrecy waivers at court discretion	Switzerland	1972	2nd Cir.
U.S. v. Bank of Nova Scotia	complying with subpoena of bank records in light of possible foreign law violation	Bahamas	1981	DCSDFla
In re Grand Jury Proceedings U.S. v. Field	complying with subpoena of bank records in light of possible foreign law violations	Cayman Islands	1976	5th Cir.
U.S. v. Loften	liability for substantive RICO violations of attorneys representing racketeers	-	1981	DCSDNY
U.S. v. Payner	complying with subpoena of bank records in light of fourth amendment constitutional challenge	Bahamas	1980	USSC
U.S. v. Quigg	complying with subpoena of of bank records of possible foreign law violations	Bahamas	1980	DCVt

A SURVEY OF THE CASE LAW REGARDING THE USE OF OFFSHORE AND FOREIGN BANKS AND CORPORATIONS

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Foreign corporations and banks afford a secrecy to American citizens and business which has facilitated a proliferation of white collar crime. Although foreign secrecy laws serve the legitimate purpose of protecting privacy, these laws are increasingly being abused to secret or launder illicit profits from narcotics, bribes, securities fraud, or embezzlement; to evade taxes, regulatory agencies, or creditors; and to thwart criminal investigations by prohibiting disclosures to U.S. authorities. Records outside the U.S. are seldom subject to U.S. jurisdiction; thus, absent the cooperation of foreign officials; secrecy laws make it virtually impossible to discover the activities of someone conducting business through a foreign entity. Although the uses of offshore and foreign banks and corporations are virtually unlimited and not easily categorized, a survey of the cases reveals three predominent schemes: (1) the laundering or secreting of illegal profits; (2) the secreting of legal profits for illegal purposes; and (3) the use of offshore and foreign entities as an integral part of an overall criminal scheme. Several courts have also ruled on considerations pertaining to litigation which bear on this issue, such as the reach of U.S. jurisdiction over foreign entities, the effect of subpoenas served extraterritorially, and the constitutionality of forced disclosure of secret accounts, discussed in part (4) of this survey.

I. Laundering Illegal Profits

In the matter of Arawak Trust Company, Ltd., 489 F. Supp. 162 (1980). The grand jury held an investigation to determine whether "kickbacks" to officials of the Central States Fund of the Teamsters Union were laundered through Arawak, a Cayman corporation, as part of a scheme to defraud the Fund. The grand jury sought a contempt order for disobeying a subpoena duces tecum. Held, a grand jury lacks the power to subpoena the records of a foreign corporation which maintains no office in the U.S., does not hold itself out as doing business within the U.S., has no significant property within the U.S., but did maintain bank accounts. (See also Los Angeles Times, October 10, 1980.)

Bank Saderat (Iran) v. Marashi, (Sup. Ct. GA. 1982). Iradj Marashi, former manager of Bank Saderat Iran's Los Angeles office, was charged with misappropriating $2.5 million in bank funds during the Iranian assets freeze in the U.S. Marashi had convinced officials in Teheran that it was possible to circumvent the freeze by wiring funds for the Los Angeles office in personal drafts made out to him. The funds were actually deposited in his wife's account in a U.S. bank, then transferred to a private trust or to Liechtensteinische Landesbank in Vaduz, Liechtenstein. Marashi is also charged with overriding loan officers in approving loans for several "shell" corporations, including a Liechtenstein corporation, and accepting fraudulent financial statements from borrowers without any effort to verify their accuracy.

Dennis Carlston (IRS Investigation, Western Office). Defendant was charged with narcotics related offenses and laundering $85,000 through a Cayman entity. He was reported as having about $450,000 in unexplained expenditures allegedly coming from a loan from the same Cayman entity. The money was reported as "investment consulting fees" through a Liechtenstein entity.

James Cross (IRS Investigation, Southwest office). Defendant was convicted of usurping a corporate office for his own use, directing U.S. buyers to remit payments to Bermudian bank accounts, secreting these funds to avoid paying taxes.

Francisco Fernandez and Guillermo Hernandez (IRS Investigation, Southeast Office). Defendants were each found guilty of laundering drug funds through Cayman and Colombian banks, respectively, establishing undisclosed bank accounts, tax shelters, and trusts offshore for hundreds of U.S. citizens for tax evasion purposes.

Rogelio A. Fernandez, (IRS Investiation, Southwest Office). Defendant was convicted of narcotics related offenses and of failing to claim proceeds there from, alleging they were received as a loan from a relative in Mexico.

Firestone Rubber, Inc. (IRS Investigation, Central Office). Defendant was convicted of tax evasion, secreting gains from foreign assets and illegal gold trading in undisclosed Swiss accounts.

John D. Fox, (IRS Investigation, Southeast Office). Defendant was convicted of establishing trusts for U.S. citizens for tax evasion purposes and for laundering drug money in Ecuatorian banks.

Eduardo Garsia and Alfredo Garcia (IRS Investigation, Southeast Office). Defendants were each convicted of secreting illegal funds obtained by insurance fraud and other schemes in Panamanian and Puerto Rican bank accounts, and not reporting the funds for tax purposes.

Michael J. Grassi, (IRS Investigation, Southeast Office). Defendant, a narcotics trafficker, laundered drug profits through the Cayman Islands to purchase a U.S. airport.

Hughes Tool Co. V. Meier, 489 F. Supp. 354 (1977). In a civil suit against an agent to recover for breach of trust in handling of mining claims and for diversion of funds, the defendants were held to have known of and arranged the transfer of nearly $5 million, secreted in bank(s) in the Netherland Antilles.

Ostrer v. United States, 77 Civ. 1805-CLB (DCSDNY 1977). Defendant was convicted of securities fraud. The government's key witness, Hellerman, was involved in an elaborate scheme to defraud two U.S. corporations in which he held a controlling interest by laundering embezzled funds at a Bahamian casino, the Paradise Island Casino, and retrieving the proceeds by a facsimile gambling scheme. Held, as the government was aware of the witness's criminal conduct and failed to divulge this evidence to the defense, the conviction was reversed.

People v. Wilson, Crim. No. A379065 (Sup. Ct. LA 1982). Catherine Subblefield Wilson was indicted for masterminding the nation's largest child pornography ring, handling 80% of child porno in the country, said to gross over $525,000 a year. Customer's payments were funnelled into secret bank accounts in the Cayman Islands and Switzerland.

Carlos R. Porro (IRS investigation, Southeast Office). Defendant was charged with laundering drug profits through several offshore banks and establishing trusts for U.S. citizens to facilitate tax evasion.

Derek Price, (IRS Investigation, Southwest Office). Defendand was charged with using a Cayman bank and corporation to launder drug money, and with tax evasion.

Securities and Exchange Commission v. Certain Unknown Purchasers of the Common Stock or Call Options for the Common Stock of Sante Fe International Corporation, 81 Civ. 6553 (WCC) (DCSDNY 1981); Securities and Exchange Commission v. Martin, (DCWDWash. 1982). Gary L. Martin was charged with violations of the Securities and Exchange Act by fraudulently trading in the securities of Santa Fe International Corp. Inc. based on "material non-public information" concerning the acquisition of all of Sante Fe by Kuwait Petroleum Company, wholly owned by the government of Kuwait. He received the information from a Santa Fe director who had consulted him for tax planning advice. Illegal profits totalled over $1.1 million, at least half of which was secreted in Seattle First National Bank's branch in Zurich, Switzerland. The district court issued an order to "freeze' the assets pending this litigation. Also charged with fraudulent trading based on material non-public information were Faisal Al Massod Al Fuhait, Oil Minister of Kuwait & Chairman of the Board of KPC, and "certain unknown purchasers of the common stock of Santa Fe", trading through certain designated financial institutions named as nominal defendants, which as of the indictment date, had not been identified by the SEC (with the exception of Darious N. Keaton, who agreed to disgorge all profits).

Securities and Exchange Commission v. Zolp, Civ. No. 82-1384-K(I) (DCSDCal 1982). Emervac Corporation and Marshall A. Zolp, president of Emervac, were charged with fraud in the promotion of unregulated stock in the company, by claiming to have the rights to a revolutionary fire escape product which it did not have. Funds were used by Zolp to defray personal expenses or were secreted at his Bahamian bank account.

United States v. Beltempo, 675 F.2d 472 (1982). Defendant was convicted for his participation in an elaborate drug conspiracy, laundering profits through a Swiss bank account.

United States v. Dichne, 612 F2d 632 (1980). Zeeve Dichne was convicted of failing to file required currency transaction reports when transporting over $5,000 into or out of the U.S. He had been contacted by Joseph Hauser, controller and operator of a number of insurance companies involved in providing health care insurance to labor unions, to transport to Switzerland $2 million embezzled from funds marked for workers' claims. Dichne had deposited $400,000 (the first installment) into a Los Angeles bank and received a cashier's check payable to an accomplice who endorsed it to render it negotiable. Dichne, Hauser and another then flew to London and eventually Switzerland to deposit the check.

United States v. DiStefano, 361 F. Supp. 971 (1973), Joseph DiStefano, a member of the County Board of Elections of Hillsborough, Florida, was convicted of fraud and accepting kickbacks in return for awarding a series of contracts to Shoup Voting Machine Corporation, extremely unprofitable to the county. The checks were laundered through Zabar Sales, Ltd., a Bahamian corporation.

United States v. Eimers, Crim. No. 82-746-CR-SMA (DCSDFLA 1982). Robert Eimers, a Miami attorney, and several others were charged with operating an escort service as front for prostitution, and laundering at least $500,000 in the illegal profits through a Bahamian bank. The scheme was uncovered through Operation Greenback investigations, a joint project of the Internal Revenue Service and Customs Service, that has been investigating money-laundering activities in South Florida for the past two years. (This case is one of few Greenback investigations not involving the laundering of drug money.)

United States v. Enstam, 622 F.2d 857 (1980). Raymond Enstam, Ralph Holley, Paul Hodgson and Harold Oldham (credited with scheme) were convicted of tax evasion and laundering of drug money through a Cayman Island corporation, Esmeraldes and Mariposas (E&M), which would return the funds in the form of fictitious loans to American corporations formed solely to recieve the loans. Thus, money otherwise taxable though illegal, was disguised in the form of nontaxable loans. (See Oldham's testimony before PSI, Hearings on International Narcotics Trafficking, November 17, 1981, pp. 66-70, and attached notes.)

United States v. Erwin, (Sup. Ct, Riverside Cty. 1982). Randolph Erwin, a former U.S. Life Savings and Loan Association employee, and Douglas Carlton, a Dallas businessman, were charged with defrauding U.S. life depositors of about $4 million. The funds were secreted at the Bank of Nova Scotia, Cayman Islands. The district court ordered the Bank not to release any of Carlton's funds; that request was honored.

United States v. Friedland, 660 F.2d 919 (1981). David Friedland and his father, Jacob, were convicted of accepting kickbacks in their capacity as general counsel to the pension fund maintained by Teamsters Local 701 in New Jersey. Defendants arranged for Barry Marlin, a California businessman, to receive a $3.5 million loan from the fund in return for a 9% kickback which defendants required be obtained from sources outside the U.S. banking system. Marlin used the First Kensington Bank of Cayman Islands, a bank under his control. Kickbacks were allegedly secreted at defendants' Swiss bank account at Barque L'Indochine et de Suez in Lousanne, Switzerland under an alias.

United States v. Garfield Bank, Crim. No. 81-71 (DCCDCal 1981). The Garfield Bank of Montibello, California, its president-chairman-seventy percent owner John A. Gabriel, and several others were indicted for conspiring with Nathan Markowitz, a recently murdered drug attorney, to provide money laundering services for narcotics traffickers. The funds were delivered to Garfield Bank, wired to a trust account in the Bank of Bermuda, then wired back to the U.S. with fictitious loan documents prepared by Markowitz to create the appearance of a legitimate nontaxable source. The Garfield Bank failed to file CTRs on these transactions in order to further secret the funds from the Internal Revenue Service. The Bermudian trust accounts were controlled by fictitious "investment advisor" companies created by Markowitz in Panama and Liberia, a means of secreting the identity of the traffickers.

United States v. Govern, Crim. No. 82-3-Cr-OC (DCMDFla 1982). Robert Walter Govern, a buildor, was charged with laundering a total of $4.1 million in illicit drug money through corporations in Grand Cayman and the Netherland Antilles. Govern executed an unsecured promissory note in favor of Zandra Holdings, Inc., in the amount of $1.6 million, subsequently invested by Zandra in Govern's business. Another 2.5 million in drug money was purportedly the proceeds of a secured loan from Mexivest, N.V., an Antilles Corporation, invested in other developments of Govern.

United States v. The Great American Bank, Crim. No. 82-720-CR-EPS (DCSD Fla. 1982). The Bank, two Florida corporations and 13 people were indicted for their participtaion in a money laundering scheme filtering over $96 million in illicit drug profits. Traffickers delivered large sums to the corporations and individuals, who then deposited the money at the Bank, which failed to file accurate curency transaction reports with the Internal Revenue Service to conceal the illegal source of the money and true identities of the depositors. The Bank subsequently transferred funds to accounts in Zurich, Switzerland (Swiss Bank Corporation), Panama (Banco De Iberamerica), and Lima, Peru (Banco Internacional, Banco Del Credito, Bank of Tokyo).

United States v. Long, (DCWDPa). Thomas E. Long and several co-conspirators were indicted for their participation in a drug smuggling scheme operating out of Jamaica, Columbia, Miami, Pennsylvania and Alabama. Long had Anthony Bowe, an officer of Columbus Trust Nassau, Bahamas assist in concealing the source of profits by laundering the money through Bahamian corporations and then transferring the fund to two Miami corporations formed solely to receive the funds.

United States v. Rittenberg, Crim. No. 80-02565 (DCSDCal 1980), Defendants were charged with importing multitons of marijuana from Mexico into California through an intricate drug conspiracy. Illicit proceeds were laundered through various corporations formed in Liechtenstein, Switzerland, and the Bahamas, then redistributed in the form of loans to the "clients" of these entities. Proceeds were actually reinvested in the operation and in property purchased with proceeds from the operation.

United States v. Sand, 541 F2d 1370 (1976). Nicholas Sand and Robert Timothy Scully were convicted of narcotics offenses & tax evasion. Profits from illegal drug sales were laundered by transfers from the U.S. to secret accounts in the Bahamas, to other secret accounts in Switzerland (Paravicini Bank of Berne, later known as the Metropolitan Bank). Attempts to suppress Sand's bank records were unsuccessful, as under United States v. Miller, 425 U.S. 435, a depositor has no standing to challenge an IRS summons directed at his bank.

United States v. Scotto, 641 F.2d 47 (1980). Anthony Scotto, president of Local 1814 of the International Longshoreman's Association and Anthony Anastasio, executive vice president, were convicted of RICO violations, tax evasion and accepting illegal payoffs in excess of $250,000 (Taft-Hartley). Scotto allegedly received $210,000 over a 3 year period from John W. McGrath Co., a stevedoring unit in return for his help in reducing fraudulent and exaggerated workmen's compensation claims filed by members of Scotto's local. To keep the illicit payments off the company's books, the money was wired by a Philadelphia bank to Bordier & Cie, a bank in Geneva, Switzerland in favor of one C.C. Howard who then had the Swiss bank wire funds back to his account at Brown Bros. Harriman & Co., a private New York Bank. Howard would draw cash from the account to turn back to McGrath, which was placed in a Chase Manhattan Bank safe deposit box. (See Wall Street Journal, Article, October 29, 1979).

United States v. Sonal Corporation, (DCSDFla 1981). Sonal Corp., a Columbian money exchange, was prosecuted for laundering illicit funds derived from a Columbian drug smuggling operation through their account at Capital Bank in Miami, Florida. Under civil forfeiture laws, the district court approved the forfeiture of the Sonal account totalling $8.5 million, the largest drug cash confiscation in history.

United States v. Sterling, Crim. No. 82-86M (DCWDWash 1982). Robert Sterling was charged with laundering proceeds from a multi-million dollar marijuana smuggling enterprise through Heusser Bank in Switzerland. U.S. authorities requested his bank records under the U.S.-Swiss Treaty on Mutual Assistance in Criminal Matters, but the account was blocked by the Swiss. (U.S. authorities had evidence that Sterling had financial assets in Liechtenstein and Cayman Islands but were unable to ascertain their amounts.) Sterling was found guilty and ordered to forfeit all assets obtained through his 10 year reign as supervisor of the drug ring.

United States v. Toombs, (DCEDVa. 1982). Twenty individuals, including Washington area attorneys W. Stephen McConnell (ex-DOJ tax attorney) and Arthur S. Meisnere, ran or profited from a $75 million marijuana-hashish smuggling operation, laundering $30 million through dummy domestic and foreign entities (Cayman Islands, Bahamas) and offshore banks (including Bank of Nova Scotia, Cayman Islands). The indictment alleges conspiracy, racketeering, drug smuggling, failure to file currency reports, abuse of lawyer escrow accounts, tax evasion, and bribery of grand jury witnesses, and seeks forfeitures.

Chuster Zabik, (IRS Investigation, Central Office). Defendant, purchasing agent for a large corporation, was convicted of tax evasin, secreting kickbacks received from vendors who wired funds to an account in Geneva, Switzerland.

II. Secreting Legal Profits for Illegal Purposes

Roy G. Anderson, (IRS Investiation, Western Office). Defendant was convicted of secreting over $2 million in real estate profits in a Bermudian bank, failing to report the gains for tax purposes.

John Berkey and Phillip Weinstein, (IRS Investigation, Southeast Office). Defendants were each charged with illegal diversion of pharmaceuticals and business receipts to Belgian accounts.

Bronston v. United States, 409 U.S. 352 (1973). Samuel Bronston was the sole owner of Samuel Bronston Productions, Inc., which produced motion pictures. Prior to declaring bankruptcy, Bronston transferred all assets to the company's Swiss bank account. When asked if he had a Swiss account, he responded negatively, as it was in the company name and not his. Held, perjury does not include a witness's literally true though unresponsive answer, even if calculated to evade.

CBS Imports, Inc. (IRS Investigation, Mid-Atlantic Office). Defendant was convicted of using its Hong Kong subsidiary to bribe a supplier.

Victor M. Divivo, (IRS Investigation, Mid-Atlantic, Mid-Altantic Office). Defendant was convicted of diverting business receipts for his personal use and secreting the funds in Swiss bank accounts to evade taxes.

Ralph D. Franks, (IRS Investigation, Southwest Office). Defendant was charged with tax evasion by diverting income to a shell corporation in Bermuda.

Margarito Garza, (IRS Investigation, Mid-west Office). Defendant concealed unreported receipts by purchasing Mexican bonds.

Dan H. Lloyd, (IRS Investigation, Southwest Office). Defendant was convicted of tax evasion by diverting income to a Cayman company and bank.

Phillips Petroleum, Inc. (Southwest Office). Defendant was convicted of concealing the existing of a Swiss account used to generate funds for illegal political compaign contributions and kickbacks. Phillips also secreted substantial amounts of income in Panamanian accounts, failing to report the income for tax purposes.

William I. Rials and Stanley E. Galkin, (IRS Investigation, Southeast Office). Defendants were each convicted of diverting overseas equipment sale proceeds of a U.S. corporation to a Cayman corporate bank account and failing to report such income for tax purposes.

Paul L. Rioux, (IRS Investigation, Mid-Atlantic Office). Defendant was convicted of diverting farm income and secreting the funds in a Canadian bank, failing to report earned interest, thus concealing the income from the IRS.

Schlensky v. Dorsey, 574 F.2d 131 (1978), Shareholders of Gulf Oil Corp. sued derivatively to recover illegally expended corporate funds in excess of $18,800,000. In 1973 and 1975, Gulf officials revealed that the vice president in charge of government relations, Claude C. Wild, Jr., had donated corporate funds to the 1972 election campaigns of Nixon, Representative Mills, and Senator Jackson. The allegations in an SEC action charged that over $10 million were channeled, by means of false entries in books and records through Bahamas Exploration Co., Ltd., a subsidiary of Gulf located in Nassau, the Bahamas for eventual distribution to political individuals and entities at home (about $5,400,000) and abroad (the balance).

In the matter of Harry L. Sears, 425 F. Supp. 1190 (1977). Action involving the disbarment of Sears, attorney for Robert L. Vesco (See SEC v. Vesco), for illegal political contributions. Vesco gave money to Sears through a Bahamian bank, he then made the contributions.

Charles W. Sizemore, (IRS Investigation, Southwest Office). Defendant was convicted of tax evasion secreting unreported income in a Bahamian bank.

Frank J. Tuseck, (IRS Investigation, Mid-Atlantic Office). Defendant was convicted of tax evasion, secreting U.S. corporate receipts in a controlled bank account and brokerage account in Cayman Islands under fictitious names.

United States v. Aita, Crim. No. 82-202 (DCNJ 1982). Gaetano Nito Aita, an importer of wines from Italy, and Glenn C. Dougherty, manager of the First National Bank of New Jersey, were charged with secreting over $1.45 million from the Internal Revenue Service by failing to file the required Currency Transaction Reports (CTRs) on transactions in excess of $10,000. Dougherty and Aita disguised the amounts by dividing the cash into separate deposits in various checking accounts controlled by Aita.

United States v. Baskes, 649 F.2d 471 (1980). Baskes, an attorney, was prosecuted for developing a complex scheme attempting to avoid the negative tax consequences of the purchase by Samuel Zell of an office-apartment complex and hotel from the Cavanaugh family. The scheme consisted of a conspiracy to treat $700,000, a portion of the purchase price, as if it were payment for a mining claim (found to be eventually worthless) as follows:

The Cavanaughs transferred the claim to "Jeffrey Investment Co." (a shelf company of Baske's law firm) in return for proeffected stock worth $10,000. The common stock of Jeffrey was owned by Castle Trust Co., a trustee of T-5088, a Cayman trust held for the benefit of Cavanaugh's children. (Upon liquidation of a company, preffered stockholder's receive the value of the stock, and common stockholders receive the balance). Jeffrey then sold the claim to Zell for $700,000, which Zell deposited in T-5088. Upon liquidation of Jeffrey, the Cavanaughs received their $10,000 and Castle, the balance. As a foreign trust, under the Internal Revenue Code, no tax is paid by the trust on the sale of a capital asset after liquidation until distributed to beneficiaries who are U.S. citizens. Had the Cavanaughs actually parted with something of value (worth $700,000 are bound to appreciate such amount) the treatment would have been legitimate. In this case the jury found the mine to be worthless and the transaction a sham devised to hide $700,000 of "income from the sale of real property" from federal income taxation, and from gift taxation (as a gift to his children).

United States v. Carver, Crim. No. 81-00342 (DCDC 1981). Roy R. Carver, vice president of Raytheon Co., a radar concern that installed Hawk missile systems in Saudi Arabia; Joseph C. Lemire, a Raytheon executive; Lionel W. Aschuck, chairman of Interconex, Inc., a shipping firm; and John T. Stephens, president of Interconex were indicted for a conspiracy to defraud the Saudi Arabian government. Carver was charged with conspiring with Interconex executives to add on inflated costs concealed as freight charges to several hundred units of modular housing purchased by Raytheon for the Saudi Project, in return for $1 million in bribes to Carver. Proceeds were paid from secret bank accounts of offshore corporations in Liberia, Switzerland, Leichtenstein, and the Cayman Islands.

United States v. Crawford, Crim. No. H82-224 (DCSDTex 1982). Petroleos Mexiconas (Premex) (Mexican national oil company) was interested in purchasing turbine compression system and related equipment. Crawford Enteprises, Inc, interested in the contract (worth $200 million) was charged with making illegal payoffs to government officials in order to obtain the purchase orders. Defendant transferredfunds through interstate commerce by foreign banks. Defendant's bid was inflated by 5% to cover the bribe, and each subcontractor's was proportionately marked up to appear competitive. (These subcontracts were subsequently charged with aiding and abetting: See United States v. Miller Corp., Criminal No. 82-788 (CDCal), United States v. Ruston, Crim. No. H-82-207 (SDTex), United States v. International Harvester Company, Crim No. H-82-244 (SDTex, Houston Division).

United States v. Hajecate, 683 F.2d 895 (1982). Thomss M. Hajecate and Thomas H. Hajecate, owners of Uni-Oil, Inc., an oil company, and Lance Eisenberg, their tax attorney, were indicted on several counts of tax evasion. Violations stemmed froma scheme to conceal the Hajecates' interest in a Cayman bank account. To further the conspiracy defendants filed false returns, failed to report financial transactions between persons in the U.S. and foreign institutions to Customs Service. and failed to report transfers of money between the U.S. and the Cayman Islands.

United States v. McPartlin, 595 F.2d 1321 (1979). In 1971, the Sanitary District of Stickney, Illinois awarded a sludge transporting contract to the Ingram Corporation after the bribery of city officials, including Robert McPartlin. Payments were made in both cash and letters of credit drawn on a Swiss bank account. (In negotiating two of the letters, defendants went to a bank in Vaduz, Liechtenstein to have that bank present the letters to the Swiss bank.)

United States v. Phillips Petroleum Co., 435 F. Supp. 622 (1977). Phillips was found guilty of tax evasion. The charges revealed that Phillips had improperly failed to record in it books $2.6 million concealed in Swiss bank accounts (chiefly Bank Leu, Zurich) disbursements from which were made to foreign associates and other uses never properly recorded.

III. Use of Offshore and Foreign Entities as an Integral Part of an Overall Criminal Scheme

CFTC v. U.S. Metals Depository, 468 F. Supp. 1149 (1979). The CFTC sought preliminary and permanent injunctive relief against Metals Depository Corp. (MDC), a New York corporation, for violation of the fraud provisions of the Commodity Exchange Act. MDC contended that it actually solicited and sold gold or silver, and not options, for deferred delivery, and thus was not subject to regulations. The purchasers was pay a fee for the right to buy bouillon, MDC would then place an order with the Overseas Credit Bank of Luxembourg to cover each purchase, and the purchaser upon delivery would either accept or compel, as he had the right to, MDC to repurchase. Held, because substance prevails over form and the transactions resemble options, MDC was subject to regulations.

Oran W. Cotton, (IRS Investigation, Southwest Office). Defendant was convicted of taking oil drilling deductions of almost $600,000 in commissions, fraudulent in that at least $200,000 of this sum was returned to him via a Cayman bank account.

Karl L. Dahlstrom, (IRS Investigation, Western Office). Defendant was convicted for his participation in sham "double trusts" in Belize and the Turks and Caicos Islands.

Billie Sol Isks, (IRS investigation, Southwest Office). Defendant used a Liechtenstein company tc conceal his U.S. transactions.

Cabin Lisenberg (IRS investigation, Western Office). Defendant was charged with taking false deductions for insurance permiums which were in activity for insurance premiums which were in actuality paid to a Bahamian entity and later transferred to an offshore trust of which defendant was beneficiary.

Robert Falvo and Richard D. Smith, (IRS Investigation, Southeast Office). Defendants were each indicted for tax evasion stemming from deductions taken for fraudulent mining tax shelters in Columbia.

Fidenas v. Compagnie International Pour L'Informatique, CII Honeywell Bull, S.A., 606 F.2d 5 (1979). Plaintiffs, Fidenas A.G. (a Swiss Co.), Sidesco International, Ltd. (a Bahamian Co.) and G.P. Jurich, German citizen, managing executive and sole shareholder of the companies sued the central defendant, a Swiss computer sales company operating exclusively in Switzerland under "Honeywell Bull, S.A." (HBS), for fraud. Jurich had arranged financing for HBS by Fidenas through the issuance of promissory notes, which in turn were sold to various other financial institutions. The notes were subsequently found to be fraudulent, having been prepared and forged by Staempfli, HBS's chief financial officer, who invested the proceeds in speculative ventures which eventually went bankrupt. Several of the institutions left holding the worthless notes subsequently sued. (See also Fidenas A.G. v. Honeywell, Inc., 77 Civ. 4761 (SDNY) and Bishops International Bank, Ltd. v. Honeywell, Inc., 77 Civ. 5598 (SDNY).

John S. Howell, (IRS investigation, Southwest Office). Defendant's Belize subsidiary was liquidated and proceeds were deposited to the company's Puerto Rican bank account. Records were falsified to show receipts as "consultation" fees. Trusts were used to further divert the funds for the taxpayer's personal use.

IIT, an International Investment Trust v. Cornfield, 619 F.2d 909 (1980). One of a series of cases resulting from the "financial debacles" of Investors Overseas Services, Ltd. (IOS), first a Panamian and then a Canadian corporation, IIT, controlled by IIT Management Company (Management) and IOS brought an securities fraud action against both Management and IOS for conspiring together with King Resources Company and its affiliates to raid IIT for the benefit of King (which required injections of vast sums to survive) and those in control of IOS & Management who in return received kickbacks and other benefits. (See also State of Ohio v. Arthur Anderson and Co., 470 F.2d 1370 (10th Cir. 1978); Arthur Anderson and Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1977); Arthur Lipper Corporation v. SEC, 547 F.2d 171 (2nd Cir. 1976) reh. den. 551 F.2d 915 (2nd Cir. 1977); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2nd Cir. 1975); IIT v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975).)

Index Fund, Inc., v. Hagopian, 417 F. Supp. 738 (1976). Robert Hagopian, president of Index, was charged with various violations of the Securities and Exchange Act. Hagopian allegedly caused Index to purchase securities from the "Armstrong Fund", a Bahamian mutual fund, which were either worthless or purchased at inflated prices for his own personal gain.

Sahact v. McCollum, (IRS Investigation, Southwest Office). Defendant was convicted for accepting kickbacks, through fictitious invoices of Lebanese and Mexican entities, using currency from a foreign subsidiary's bank account, and failing to report the funds for tax purposes.

Lea J. Marks and Harold J. Marks (IRS Investigation, Southeast Office). Defendants were charged with taking false deductions through a movie tax shelter, by purchasing films from Liechtenstein anstalts using Cayman and Swiss corporations.

James M. Moran, (IRS Investigation, Southeast Office). Defendant was charged with tax evasion arising from false deductions for "franchise insurance and foreign brokerage fees" for a U.S. corporation. The $2 million were actually diverted to Bahamian and Cayman sham corporations.

Benjamin Mudd, (IRS Investigation, National Office). Defendant, a commodities trader, was convicted of tax fraud for responding negatively to questions on his return regarding any ownership of a foreign bank account, thereby concealing his Swiss account.

New York County v. Firestone, (NYCyt 1982). Richard Firestone and Milton Dorison, promoters, were indicted for scheming to defraud over 200 investors of nearly $40 million in a fraudulent coal mining venture. To provide incentives for investment, defendants arranged loans of 3 times the amount invested, to produce a tax deduction of the entire amount, from Columbus Trust Co., Nassau, Bahamas. Columbus Trust allegedly funneled $31 million through several offshore corporations, then back to Columbus, leaving the impression that legitimate loan transactions actually took place. As the loans were nonexistent and no mining was ever done, the deductions were fraudulent.

Virgil Ogletree, (IRS Investigation, Central Office). Defendant was charged with secreting property ownership in the Bahamas to evade the IRS, subsequently using nominees to purchase back assets seized by the IRS.

Gerald Rogers (IRS Investigation, Western Office). Defendant was indicted for his participation in various tax shelter shemes involving activities in Panama.

Leonard Rosen, (IRS Investigation, Western Office). Proceeds from U.S. land sales were shifted offshore by corporation the shares of which were owned by Bahamian trusts. The defendant was beneficial owner and controller of the trusts.

Robert M. Saunders, (IRS Investigation, Central Office). Defendant was convicted of tax fraud involving the deduction of fraudulent commodity futures losses derived from a British firm.

Securities and Exchange Commission v. Bank of Credit and Commerce International, S.A. 78 Civ. 0469 (DCDC). Defendnat a Luxembourg banking institution and financial advisor was charged with violations of securities regulations. The bank, on its behalf and on behalf of clients from Kuwait, Saudi Arabia, and several other foreign countries, accumulated substantial ownership of Financial General Bankshares, Inc., a U.S. corporation, without complying with beneficial ownership disclosure requirements of the Securities and Exchange Act.

Securities and Exchange Commission v. Banque de Paris et. dis. Pays-Bas (Suisse) S.A., Civ. No. 77-0798 (DCDC). Defendant, a Swiss bank, was charged with Securities and Exchange Act antifraud violations for filing information statements which contained "untrue statements of material facts" in connection with acquisitions by defendants of securities of several U.S. corporations.

Securities and Exchange Commission v. Cayman Island Reinsurance Corp., Ltd., 82 Civ. 1166 (DCSDNY). Cayman Island Reinsurance Corporation, Ltd.(CIR), a Cayman corporation, Raymond Dirks, former partner of John Muirs & Co., a U.S. broker-dealer firm, and several codefendants were charged with securities fraud arising from one of the firm's underwritings. Dirks and his codefendants agreed to us $2.5 million raised from a $4.8 million underwriting of CIR to buy stock from other Muir underwritings that had not been sold, a use of proceeds inconsistent with disclosures contained in the final prospectus which CIR filed with SEC.

Securities and Exchange Commission v. Diplomat National Bank, Civ. No. 77-1695 (DCDC). Diplomat National Bank (DNB), a U.S. bank, was charged with securities regulation violations, by allowing several Korean nations to purchase in excess of 5 per cent of DNB stock, without complying with beneficial ownership disclosure requirements of representations made in the offering circulars to prospective purchasers. Purchasers were concealed through the use of nominees.

Securities and Exchange Commission v. Everest Management Corp., 71 Civ. 4932 (DCSDNY) 1979. Alfred R. Herbert, Swiss citizen and former officer of a Swiss bank, was found to have participated in manipulation of the trading of two securities on the U.S. over-the-counter markets and repeatedly violating antifraud provisions. He utilized Swiss bank secrecy laws to effectuate and then conceal the manipulative conduct in which he and others were engaged.

Securities and Exchange Commission v. General Refractories Co., 400 F. Supp. 1248 (1975). General Refactories Co. (G.R.) H. Mayer, a substantial shareholder of G.R., and Dan Mayer, H. Mayer's son and director of G.R., were charged with violating the Securities and Exchange Act antifraud provisions in several respects, including failing to file required reports when acquiring greater than 5% interests in a public company. H. Mayer was discovered to be the beneficial owner of 17% of G.R., obtained through various European companies owned and/or controlled by him. The aggregate sum to be purchased was divided among the offshore corporations to conceal the true owner and true percentage of ownership.

Securities and Exchange Commission v. Kasser, 548 F.2d 109 (1977). Alexander Kasser and several codefendants were charged with violating Securities and Exchange Act antifraud provisions, defrauding the Manitoba Development Fund, a Canadian government owned corporation formed to invest private enterprise in the creation of a forestry development in that province. Kasser induced the Fund to invest in debentures of two corporations, Churchill Forest Industries (CFI) and River Sawmills Company (RSC), owned by Kasser. The agreement provided that loan disbursements bythe Fund were conditional upon "matching" investments in CFI and RSC by Kasser or other corporations owned by him. Kasser never made legitimate investments, but rather recirculated the very proceeds from the Fund to make it look as though a Kasser-contribution had been made. To conceal this recirculation the loan proceeds were laundered through various corporations and bank accounts in the United States, Canada and Switzerland. As a result of limited equity and misappropriations by Kasser, CFI and RSC went bankrupt.

Securities and Exchange Commission v. Katy Industries, Inc., Civ. No. 78C-3476 (DCND ILL). Katy Industries, Inc., a U.S. corporation, was charged with violating the periodic reporting, proxy solicitation, antifraud, and foreign corrupt practices provisions of Federal securities law regarding a total of $250,000 in payments made in connection with obtaining an Indonesian oil concession. Payments were made to an Indonesian government official through the official's Cayman Island corporation, to which a Katy subsidiary was to pay 13.33 per cent of its annual net profits.

Securities and Exchange Commission v. Vesco, 72 Civ. 5001 (DCSDNY 1972) Robert L. Vesco, chairman of the board of directors of International Controls Corporation and IOS Ltd., was charged with several counts of securities fraud and the misappropriation of hundreds of millions of dollars from U.S. corporations he directed. In a conspiracy which spanned several years and involved several coconspirators and domestic and foreign entities, Vesco caused a fund he directed, the Dollars Fund (DF), to sell approximately $200 million worth of its stock, a portion of this to foreign entities he controlled, and to make investments in his foreign entities, unprofitable DF, without disclosing his interests. The Overseas Development Bank Luxembourg (ODB) and Bahamas Commonwealth Bank (BCB), two banks also controlled by Vesco, were used to hold certain securities he caused DF to purchase, rather than DF's designated custodian of securities, further concealing their misuse of DF's assets. Vesco similarly caused other companies he directed, which had policies of investing predominantly is U.S. securities, to transfer millions of dollars from their U.S. banks to his Bahamian and Luxembourgian banks in the form of investments in or high-risk, unprofitable loans to offshore entities he controlled, including several in the Bahamas and Costa Rica, to the severe detriment of these companies' shareholders, in transactions ill calculated to achieve their investment policies. In order to decieve investors and prospective investors in these defrauded companies, he camouflaged their flagging earnings by evaluating their transactions with his foreign entities in false and misleading ways, not in conformity with general accounting principles. For example, consideration paid by his foreign entities for stock in the U.S. corporations frequently took the form of tax indemnification agreements which Vesco would subsequently have reflected in company records at their face value, despite the unlikelihood of their materialization. The investigations into his activities is still pending, as Vesco remains at large.

State of Arizona v. Williams, Civ. No. C449099 (Sup. Ct., Maricopa Cty. 1981). Williams and his wife were charged with engaging in fraudulent securities, tax shelters, and estate planning schemes through more than a dozen domestic corporations, five Panama corporations and two Montserrat banks (all of which they controlled). They maintained accounts for these schemes in domestic banks and Foreign banks such as Banamex (Nogales, Sonora, Mexico), Swiss Bank Corporation (Canal Zone, Panama) and Trans-Caribbean Bank, Ltd. (Panama).

United States v. Becker, 569 F.2d 951 (1978). Troy Becker and several codefendants were convicted of conspiracies to defraud. Defendants induced investments in a low grade graphitic schist ore through falsified assays and reports representing that large quantities of gold & silver, capable of low cost extractio,n could be found there. Defendants knew the ore was of little value and extraction unfeasible. Investors advanced approximately $500,000 to defendants, wired to the Bahamas on the pretense that the money was needed temporarily as a cash advance for a security bond on a $10 million loan for the project. The loan, of course, did not materialize and investors lost their money.

United States v. Brinlee, Crim. No. 3-81-181 (DCND Tex. 1981). Hoyt William Lindell Brinlee and other coconspirators were indicted for their participation in a scheme to induce various individuals to cash fraudulent cashier's checks for a split of the proceeds, to induce certain individuals to accept the fraudulent checks as payment for property rights, to substitute fraudulent gold certificate contracts for the fraudulent cashier's checks once the checks were found to be worthless, and to place the fraudulent gold certificate contracts with various persons and businesses as a means of obtaining money and property. The fraudulent cashier's checks were written on a defunct offshore bank in St. John's *Antigua*, Agindustrial Bank of Commerce, the fraudulent gold certificate contracts were issued by IMF Systems, Inc.

United States v. Courtois, (DCSDNY 1982). E. Jacques Courtois, employed by Morgan Stanley & Co., and Adrian Antoniu, employed by Morgan Stanley and then by Kuhn Loeb & Co., two major New York investment banking firms were charged with leaking confidential information on prospective acquisitions to outside traders who subsequently traded on the information. Stock in the targeted companies was purchased through secret bank accounts in *Bermuda*, *Bahamas*, *Luxembourg* and *Switzerland*.

United States v. Crosby, (DCMass 1982). Peter F. Crosby (brother of James Crosby, chairman of Resorts International) and three others were charged with conspiring to acquire $23.1 million in real estate through worthless cashier's checks issued by Financial Services Bank, Ltd., a *St. Vincent* bank, owned and controlled by defendants, and by issuing financial statements reflecting fictitious transactions with the bank regarding companies controlled by them.

United State v. Federbush, 625 F.2d 246 (1980). Defendant was convicted of defrauding a U.S. Corporation, Columbus Associates of Massachusetts. After acquiring the Windward. Bank of Kingston, *St. Vincent*, defendant persuaded Columbus to transfer assets to Windward. The bank turned out to be a shell bank, not licensed to do business and in possession of no assets. Columbus was defrauded into paying obligations with Windward checks, which were totally worthless.

United States v. Firestone Rubber, 518 F. Supp. 1021 (1981). Firestone was charged with violating the Gold Act, which prohibited unlicensed acquisition and holding of gold outside the U.S. by persons subject to U.S. jurisdiction. Bank Firestone; a *Swiss* bank and wholly owned subsidiary of Firestone, conducted certain tranactions in gold, both law ful and common in Swiss banking. The government maintained that the subsidiaries were operated solely to circumvent U.S. gold regulations. Held though the Gold Act applied extraterritorially, the subsidiary was operated at arm's length as required by Swiss law and no intrusion into the independnece of the bank's management was detected by auditors, thus the subsidiary's dealings could not subject the parent to liability.

United States v. Jaeger, Crim. No. 79-0054 (SCSNY 1979). Defendant was charged with wire and mail fraud, for participation in a currency exchange swindle involving the *Grand Turks and Caicos Islands* (this may be the same individual involved in Joseph Hauser case. *See United States v. Dichne*, 612 F.2d 632 (2nd Cir. 1980).)

United States v. Kelly, 349 F.2d 720 (1965). Cecil V. Hagen, a petrolem attorney for GCL, and John Van Allen, a businessman and representative of several Swiss trusts, were convicted of a stock fraud conspiracy involving the sale of millions of dollars worth of unregistered common stock of GCL. Hagen and Kelly, in an attempt to obtain financing for GCL, met with Van Allen, a meeting which culminated in the purchase of a large block of GCL stock by the Brandel Trust a *Liechtenstein* trust that Van Allen represented. As the agreement stipulated the purchase was for "investment purposes" and not resale, the stock was not registered as required by federal securities law. Van Allen, however, began selling huge quantities of stock immediately, in contravention of the investment pledge, as all three defendants schemed to stimulate public demand for the stock through grossly exaggerated reports of GCL's to drive up prices. Hagen and Kelly allowed violations of the investment pledge, and authorized further stock transfers under similar terms, in return for kickbacks from Van Allen paid out of his *Swiss* trust, Sun Investment Co., into Universal Finance Co., a Swiss trust created by him for Hagen and Kelly, who allegedly reaped over $1 million in profits and kickbacks at the expense of the public.

United States v. Kelly, 569 F.2d 928 (1978). Harry Neil Kelly, president of the Allied Fund For Capital Growth (AFCA), a *Panamanian* fund, was convicted for his participation in a scheme to defraud Harry Bloomfield, an investor in the fund.

Kelly issued 200,000 shares of AFCA to one William Ponsoldt, restricted from redemption for one year. Ponsoldt, with Kelly's aid, in turn sold the shares to Bloomfield in return for shares in Bloomfield Building Industries, Inc., of which Bloomfield was president and owner, under the assurance that the restriction did not apply to third party purchasers. Bloomfield was unable to redeem the shares, as AFCA was in reality a fraudulently created mutual fund, the shares of which were worthless and used to obtain cash or other valuable assets.

United States v. Kilpatrick, (CDColo 1982). William A. Kilpatrick and several coconspirators, including the Bank of Nova Scotia, were indicted for their participation in fraudulent coal tax shelters and methanol tax shelters, producing over $122 million in fraudulent tax deductions for investors and yielding $27 million in profits to defendants. Coal tax shelter - Kilpatrick owned corporations offered investments in mineral leases producing deductions four times the amount of cash investment, the remaining 3/4 of the funds to be met by loans to investors from P&J Coal Company. As P&J did not have the funds for this transaction (necessary for legitimate deductions), defendants opened several bank accounts and formed several corporations in the Cayman Islands to engage in an intricate "checkswapping" scheme between the Cayman corporations so that a sufficient balance would appear in the accounts of these corporations at any given time. The Bank of Nova Scotia at Cayman processed these checks despite insufficient funds. Methanol Tax Shelter - Defendants formed limited parternships offering deductions four times the amounts of initial investments, resulting from deductible payments made by the limited partnerships to International Fuel Development Corporation under a contract to conduct "research and development" into certain methanol processes. Marlborough Investments, Ltd., a Cayman entity was to meet the balance of the investment for the limited partnerships. As Marlborough as well did not have sufficient funds for the loan, they engaged in a similar check swapping scheme between the Cayman corporations.

United States v. Krown, Crim. No. 80-CR-54 (DCColo. 1980). Kevin Barry Krown, James Feeny, Anthony P. Cavanaugh, and several other coconspirators were charged with transporting fraudulently made securities in interstate and foreign commerce. Cavanaugh paid Feeny $6,000 for $60,000 worth of fraudulent offshore checks of finance his ventures. The checks were purportedly certified by the First National Bank of Teheran of St. Vincent, West Indies. He signed a fictitious name as authorized bank signator. Cavanaugh instructed his clients to withdraw over $100,000 created by the deposits. Cavanaugh purchased $210,000 from Krown drawn on European Credit Bank Corp. St. Vincent, and followed the same procedures, knowing at all times that there were no funds to cover such amounts.

United States v. McDevitt, Crim. No. 4-82-70 (DCNDTex 1982). Donald T. McDevitt, Esq., Michael A. Carr, and Keith D. Kantor, licensed insurance salesmen, were indicted for defrauding insurance companies and tax fraud. Defendants incorporated companies to establish officers requiring "key-man" policies and through Union Commerce Bank and Trust, Anguilla, West Indies, owned by defendants, they falsified loan letters, financial statements, employment references and overstated assets and annual incomes. They were also charged with tax fraud, soliciting clients for "business consultations" with McDevitt's Bahamian based company, Interamerican Indemnity, Ltd., consultations which in fact never occurred. Ten percent of the fee would be split between client and defendant, and 90%returned in loan form thus avoiding tax on the entire amount, as business deduction and nontaxable loan respectively.

United States v. McDonnell Douglas Corp., (DCDC 1979). MDC was charged with illegal payoffs to various officials from various government owned airlines, "hiking" the quoted prices to cover the sums and later attempting to conceal the bribes through the use of purported "sales representation contracts" with the officials or offshore corporations as follows: $500,000 per aircraft to Pakistan International Airlines officials (defendants assisted in transporting funds from California to Swiss bank accounts); $3,250,000 per aircraft to Korean Air officials (commercial airlines), concealment through Jetaire, Ltd., a Guernsey Island Company, and Sampaquito Investments, Ltd a Bahamian Company, $2,000,000 to Linea Aeropostal Venzolana officials, concealed through Okemo, Ltd & Luciano Chiarini and Ass. Bermudian companies; $600,000 to Air Zaire officials, concealed through Agimex, a Belgian Company.

United States v. Newman, 664 F.2d 12 (1981). In related investigation E. Jacques Cortois, employed by Morgan Stanley and Co., Inc., and Adrian Antoniu, employed by Kuhn Loeb and Co., misappropriated confidential information concerning proposed mergers and acquisitions that was entrusted to their employers by corporate clients. The information was conveyed to Newman, a securities trader and manager of a New York brokerage firm, who passed along the information to two foreign nationals. The three used secret foreign banks and trust accounts in Bermuda, Bahamas, Luxembourg and Switzeland to purchase the stock, and spread their purchases among the brokers to avoid detection. Once the mergers were publicly announced and the market price rose, they reaped substantial profits which they shared with Courtois and Antonni.

United States v. Osserman, Crim. No. 80-371 (DCMass 1980). George Osserman and Paul Garfinkle, attorneys, and Irwin Meyer and Stephen Friedman, co-producers of Broadway Hit Annie, were indicted for involvement in a fraudulent tax shelter scheme, collecting over $20 million in lost tax revenues. Defendants set up limited partnerships in coal whereby investors could pay 80% in advance and 20% in a nonrecourse note yet offset the entire amount "up front". There was never a possibility of mining sufficient coal on the property to support the advance royalty. Defendants created phony entities, front corporations and sham limited partnerships to accomodate investors seeking to avoid personal tax liabilities, set up "straw" general partners for each limited partnership, and used transactions conducted at Cayman National Bank and Trust, Ltd., to falsely represent that defendants had made cash contributions to the limited partnerships.

United States v. Palm State Bank, Crim. No. 82-11-CR-T-K (DCMDFla 1981). Palm State Bank, Frank Weaner, Raymond McDonald, Jr., Leon Cohen, and Fred Sans were indicted for tax evasion and fraud. Cohen obtained over $300,000 in small bills from Leslie Atkinson for the sale of heroin, later "staging' a bust of the drugs, thus never delivering them to Atkinson. The money was wired from Atkinson's bank account in the Cayman Islands, then exchanged for larger bills without required filings of currency transaction reports by Palm State Bank, which at all times covered up for the other defendants.

United States v. Parker, Crim. No. 81-CR-122 (DCColo 1981). Trenton H. Parker was charged with tax fraud and aiding in the preparation of false income tax returns, resulting in $40 million in lost revenues. Parker sold investments in foreign gold mines to American citizens which were to be matched by foreign consortiums by four times the size of the initial investment, the entire amount to be taken as a tax deduction, and falsified documents to substantiate the deductions. Records from Banque de Paris et des Pay Bas, Zurich, Switzerland Barclay's Bank, Georgetown, Grand Cayman show funds were misappropriated by Parker. Records from Banca Popular de Modena, Italy and Allgemeine Deutsche Credit Ansalt, Frankfurt, Germany shows checks were bogus.

United States v. Rodriguez, Crim. No. CR-82-67J (DCCDUtah 1982). Arnaldo Luis Rodriguez was charged with defrauding John M. Felt, a Salt Lake City businessman, of $120,000. The sum represented prepaid interest for a loan Rodriguez purported to make to Felt for $1 million from the Agindustrial Bank of Commerce, Antigua of which Rodriquez claimed to be president. In reality the bank was not licensed to do business and maintained no facilities nor deposits in Antigua. (While the indictment was pending, Rodriguez was extradicted to France for conviction in a case involving forged bank documents.)

United States v. Sarault, (DCRI 1982). Aime J. Sarault, a former Providence, Rhode Island attorney, was charged with causing Barclay Douglas and Company, a Providence securities dealer to credit his account with a $150,000 international treasurer's draft drawn on Societe Generale de Commerce (Overseas) Ltd., of Nassau, Bahamas, a bank not licensed for banking activities. When the check was returned as uncollectable, Sarault caused a second worthless check to be sent to Barclay Douglas.

United States v. Twombly, Inc., Crim. No. 80-73 (DCNJ 1980). In June 1973, the Puerto Rico Water Resources Authority (PRWRA) invited bids on a power generating facility. General Electric (G.E.) was awarded the contract on the condition that it agree to use Twombly, Inc., as a subcontractor and agree to authorize the creation of a bribe fund. Under the arrangement, Twombly would supply certain materials for G.E., which would pay $4.2 million (including $1 million for the bribe fund) intended for Carlos Velaquez-Toro, PRWRA Chief of Operations and a member of the Award Committee Twombly arranged to purchase materials from Turbo-Electric Equipment, Ltd (TEE) a Bermudian firm, because it had connections to transfer the funds. The bribes were transferred from the New Jersey Bank to the TEE account in Bermuda National Bank and then to Velasquez-Toro.

United States v. Sindona, 636 F.2d 792 (1980). Michele Sindona, an Italian financier, was convicted of a conspiracy to defraud American investors and the SEC in connection with the purchase of stock of two U.S. corporations, First National Bank (FNB) and Talcott National Corporation (TNC). Sindona misappropriated $15 million from the general accounts of Banca Privata Finanziaria and Banca Unione, two Italian banks effectively controlled by Sindona and placed the funds on deposit at the Privat Kredit Bank and Amincor Bank in Zurich, Switzerland. The Swiss banks then secretly transferred the funds to Sindona-owned corporations, which used them to acquire FNB and TNC. Although the Sindona-Corporations did eventually return the funds to the Italian Banks, the transfers never took, nor were intended to take, the form of legitimate loans. In order to conceal the illegal source of the funds used to purchase the stock in the American corporations from American investors, Sindona filed false statements with the SEC, representing that the funds used to acquire FNB and TNC were his own.

United States v. Vetco, Inc., 644 F.2d 1324 (1981). Vetco, International, A.G. (VIAG) was a wholly owned subsidiary of Vetco, Inc., an American corporation manufacturing offshore drilling equipment, charged with tax evasion. The IRS charged that the acquisition of VIAG subjected Vetco to Subpart F of the Internal Revenue Code with respect to reporting VIAG's income. Vetco allegedly avoided this treatment by shipping its products to two Swiss corporations, Weidex, A.G. and Zanora, A.G., which then transferred the goods to VIAG for sale, rather than shipping its products directly to VIAG, thus causing VIAG's income to no longer be "derived from transactions with a related corporation outside Switzerland." The IRS issued a summons for production of documents located in Switzerland, which Vetco argued was precluded by the Swiss-U.S. Tax Treaty and not enforceable as a possible violation of Swiss law. The court held that the treaty information exchange provisions were not exclusive, thus summonses were appropriate means of information gathering, and that enforcement of this summons was in order as Vetco failed to show that Swiss law would in fact be violated or that it had made good faith efforts to comply.

United State v. Whipple, Crim. NO. CR-81-36J (DCCDUtah 1981). Varland Whipple, a Hollywood motion picture producer, was charged with tax fraud arising from his creation of a fraudulent movie tax shelter program which sold more than $4 million of fraudulent tax deductions and credits to the public. Proceeds were disbursed to a sham corporation, United Media Management and consultants, Cayman Islands, to prevent the Internal Revenue Service from tracing the money. A fictitious bank in the principality of Andorra, a currency exchange known as Canvi Andor, was also used to provide the investors with phony leverage.

United States v. Wolfson, 322 F. Supp. 798 (1971). Nathan Wolfson and several codefendants were charged with participating in a scheme to defraud a Agents General Insurance Co., Ltd., Toronto, Canada. Defendants operated and used several corporations, including two offshore corporations located in Nassau, Bahamas, to acquire part of the treasury stock of AGI and became their representatives in the U.S. Defendants issued policies without reporting them, failed to remit premiums, failed to notify AGI of claims arising under these policies, wrote policies in excess of the company's authorized liability, and employed several other devices to defraud AGI.

United States v. Wolfson, 634 F.2d 1217 (1980) Wolfson was convicted of defrauding the MGM Grand Hotel in Las Vegas, Nevada by cashing $115,000 in worthless cashier's checks at the hotel's casino cashier's cage. Wolfson purchased the checks at a discount from face value from Kevin Krown (See U.S. v. Krown), who owned the charter fo the First London Bank and Trust Company, of St. Vincent, West Indies, upon which the checks were drawn. As Wolfson and Krown well knew, the "bank" was a sham company with no assets to honor the checks.

Alfred I. Willett (IRS Investigation, Mid Atlantic Office). Defendant, a commodity broker, concealed his U.S. commodity trading practices through the use of a Libyan corporation.

Herbert M. Wolstencraft, (IRS Investigation, Central Office). Defendant was charged with aiding a taxpayer in tax evasion by giving false statements to the IRS regarding activities in the Bahamas.

IV. Issues pertaining to Litigation

In the matter of Arawak Trust Company, Ltd, 489 F. Supp. 162 (1980) The grand jury was held to lack the power to subpoena the records of a foreign corporation which maintained no U.S. office, did not hold itself out as doing business within the U.S., had no significant property within the U.S., but did maintain U.S. bank accounts. (See part (I).)

Application of Chase Manhattan Bank, 297 F.2d 611 (1962). A grand jury subpoena ordered the Chase Manhattan Bank to produce records located in its Panamanian branch. Upon showing that compliance by the branch would violate Panamanian law, the Second Circuit Court of Appeals had the subpoena modified, but left outstanding, so as to insure compliance by Chase in the event the Government asked the Panamanian government to authorize production.

Ingus v. Ferguson, 282 F.2d 149 (1960). The district court ordered the production of New York agencies of several Canadian banks of records located in Canada. Without passing on the actual validity of subpoena, the Second Circuit Court of Appeals held that subpoena power should be sparingly used and was not necessary in this as 1) the court had no jurisdiction over the Canadian banks; 2) the banks were not parties to the action but mere witnesses; 3) compliance could arguably violate Canadian law; and 4) both U. S. and Canadian law recognize "letters rogatory", an alternative procedure for seeking evidence in foreign countries by a number of requests to the foreign court to give its aid, and this alternative should have been exhausted first.

Ryan v. Commissioner of Internal Revenue, 517 F.2d 13 (1975). The IRS charged Raymond and Helen Ryan with tax evasion and issued to them interrogatories seeking information regarding any relationshiop between them and Commercial Credit Bank and Zurich, Switzerland. The Ryans asserted their fifth amendment privilege and maintained this excused compliance. The Tax Court denied this claim. Held, as a Court of Appeals may review only final decisions and few exceptional interlocutory decisions (28 U.S.C. §1291) and the Tax Court order is neither, case dismissed for want of jurisdiction.

Securities and Exchange Commission v. Banca della Svizzera Italiana, 92 F.R.D. 111 (DCSDNY 1981). The SEC sought an order to compel disclosure by the Swiss bank of information about its customers suspected of purchasing, on insider information, St. Joe Minerals Corporation call options immediately prior to the Seagram tender for St. Joe stock. The court required the bank to make disclosure, though Swiss criminal law prohibited the bank from doing so. The court conducted a balancing test, considering a) vital interests of nations involved, b) extent and nature of hardship that inconsistent enforcement would impose on person who is to perform conduct, c) extent to which the required conduct is to take place on the territory of the other state, d) nationality of person who is to perform conduct, and e) extent to which enforcement by action of either state can be expected to achieve compliance with that state's rule. (40 Restatement Second of Foreign Relations Law (1965).) Held, U.S. vital interests in ensuring the integrity of its securities market and fact that Swiss government was aware of and expressed no opposition to the litigation warranted disclosure.

Securities and Exchange Commission v. Minas de Artemisa, S.A. 150 F.2d 215 (1945). The district court ordered the production of books and records of an Arizona corporation and its wholly owned subsidiary located in Mexico, arguably in contravention of Mexican regulations requiring that records remain in Mexico. The Ninth Circuit Court of Appeals held that 1) the Mexican Corporation was subject to its jurisdiction as it was a wholly owned subsidiary of an Arizona corporation and its president, an American citizen, resided in Arizona and conducted virtually all the subsidiary's business out of Arizona, and 2) as the corporation was subject to its jurisdiction, literal compliance was mandatory if Mexican law would not be violated. If Mexican law would be violated, then some alternative form of compliance was in order, such as furnishing authenticated copies or allowing SEC inspection in Mexico.

Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197 (1958). Plaintiff, a Swiss company, sued to recover property seized by the U.S. pursuant to the Trading With the Enemy Act. The U.S. requested records to a Swiss banking firm which allegedly cospired with the plaintiff, but the Swiss government enjoined production of the documents. The district court thus dismissed the complaint. The Supreme Court reversed, holding that fear of criminal prosecution even by a foreign sovereign, excused noncompliance and dismissal of the plaintiff's case was not justified when good faith efforts to complywere made.

Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (1972). Plaintiff, a Swiss bank, sued defendant, its insurer, on a fidelity bond insuring the bank against losses through dishonest or fraudulent acts by bank employees after discovering that a bank manager had misappropriated funds and concealed his fraud by false entries in various customers' accounts. The district court refused the insurer's request that the bank disclose the identity of customers whose accounts were misused, as disclosure would violate Swiss law and was not essential to the issue at trial. The Second Circuit affirmed and also held that it is within the court's descretion not to require the bank to make good faith efforts to obtain waivers from customers, although the court has the power to do so. Societe International, etc. v. Rogers, 375 U.S. 197 (1958).

United States v. Bank of Nova Scotia, GJ 81-F1-1 (DCSDFla 1981). The bank was held in contempt for failing to comply with a grand jury subpoena to their Miami agent requesting the records of the bank accounts in the Bahamian branch of Robert Twist, Lesser Antilles Trading Company, and Latco Development Corporations. The bank's refusal was premised on potential criminal liability in the Bahamas of bank secrecy laws. The district court engaged in a balancing test considering (a) vital interests of each state, (b) hardship of inconsistent enforcement on the person, (c) extent to which conduct will take place in the other country, (d) person's nationality, (e) extent to which enforcement by either country would achieve compliance with that country's rule. The district court enforced the order, finding (a) U.S. criminal investigatory interests greater than Bahamian secrecy interets, as various exceptions to the secrecy laws exist, (b) the Bank made no effort to obtain consent, a Bahamian court order, or a government waiver, (c) disclosure would occur in the U.S., (d) nationality was insignificant in this case (e) subpoena enforcement would insure compliance with grand jury's investigatory goal, while exceptions to the laws indicate enforcement is not an unreasonable diversion. The order was affirmed on appeal.

In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (1976). Anthony R. Field, managing director of Castle Bank and Trust Co., Ltd. of Georgetown, Cayman Islands, was served with a subpoena while in the United States to appear before the grand jury and respond to questions which could subject him to criminal prosecution in the Cayman Islands for violating its Bank Secrecy laws. He claimed the fifth amendment. Held, the fifth amendment does not extend to situations where criminal prosecution in a foreign country is imminent.

United States v. Loften, 518 F. Supp. 839 (1981). Anthony Socolov was charged with violating the RICO conspiracy section in his capacity as attorney and investment advisor for defendant Loften. Held, one need not have been a participant in substantive racketeering activities nor have invested one's one funds in order to commit substantive RICO violations.

United States v. Payner, 447 U.S. 727 (1980). Jack Payner was charged with tax evasion, denying he maintained a foreign bank account when in fact he did at Castle Bank & Trust Co. of Nassau, Bahamas. Payner moved to suppress the introduction of a loan guarantee agreement seized in flagrant violation of the fourth amendment, which evidenced such funds as security. Held, a defendant has no standing to suppress documents illegally seized from a third party (the vice president of the bank).

United States v. Quigg, Crim. No. 80-41-1 (DCVT 1980). Roger Quigg was charged with federal tax evasion. The district court ordered the production by New York agencies of Canadian Imperial Bank of records located in the Bahamas. Held, although service on the New York agency gave the court jurisdiction of branches outside the U.S. the court would not compel disclosure which would violate Bahamian law. As enforcement of the subpoena was thus conditional on Quigg's consent, the court issued an order compelling Quigg to execute a consent form and held this not to violate the fifth amendment because bank records are neither private or testimonial in nature.

APPENDIX

LAW OF EVIDENCE IN THE UNITED KINGDOM AND SECRECY LAWS IN THE COMMONWEALTH

EVIDENCE

(For earlier statutes within the scope of this title, see Vol. 12, p. 793; Vol. 40, p. 614; Vol. 42, p. 347.)

Page
Evidence (Proceedings in Other Jurisdictions) Act 1975 482

No other statute exclusively within the scope of this title was passed during 1975, but see, in particular, the Arbitration Act 1975, s. 4, title Arbitration, ante; *the Inheritance (Provision for Family and Dependants) Act 1975, s. 21, title* Executors and Administrators, post; *the Children Act 1975, s. 102, title* Infants, Children and Young Persons, post; *the Criminal Jurisdiction Act 1975, ss. 5, 9, 10, Sch. 4, title* Northern Ireland, post; *and the Local Land Charges Act 1975, s. 12, title* Real Property, post.

THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT 1975

(1975 c. 34)

PRELIMINARY NOTE

This Act, which came into operation on 4th May 1976 (the day appointed by Order in Council under s. 10 (2), *post*), sets out a comprehensive code for the taking of evidence by courts in the United Kingdom on behalf of other courts. It re-enacts the existing law on the taking of evidence by courts in England, Scotland and Northern Ireland for the purpose of civil proceedings in a court in another part of the United Kingdom, a Commonwealth country or a foreign country; it makes some changes in the existing law to remedy shortcomings revealed by experience, and it contains some new provisions designed to enable the United Kingdom to ratify the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1968 (Cmnd. 3991). The legislation repealed and re-enacted by the Act is primarily that contained in the Foreign Tribunals Evidence Act 1856, Vol. 12, p. 825, and the Evidence by Commission Acts 1859 and 1885, Vol. 12, pp. 829, 854, as applied or extended by later enactments. New powers introduced by the Act include the obtaining of evidence for the purpose of proceedings which are in contemplation as well as those which are pending, authority to have evidence taken otherwise than on oath or affirmation, and extended powers to secure the attendance of witnesses anywhere in the United Kingdom. The Act deals with evidence in criminal matters only to the extent of preserving provisions of the Acts repealed and re-enacted which apply to criminal evidence as well.

S. 1, *post*, provides that where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, that Court shall have the powers set out in the Act if it is satisfied that the request emanates from a Court or Tribunal and that it relates to civil proceedings which have been instituted or are in contemplation.

S. 2, *post*, sets out the modes of evidence thus made available, restricts the methods to those available in civil proceedings in the United Kingdom and imposes certain limits on compliance with requests for evidence.

S. 3, *post*, gives witnesses the same rights to claim privilege as they have in the United Kingdom or in the requesting State, but allows contested evidence,

1. Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court

Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—

(*a*) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and

(*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the High Court, Court of Session or High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.

2. Power of United Kingdom court to give effect to application for assistance

(1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—

(*a*) for the examination of witnesses, either orally or in writing;
(*b*) for the production of documents;
(*c*) for the inspection, photographing, preservation, custody or detention of any property;
(*d*) for the taking of samples of any property and the carrying out of any experiments on or with any property;
(*e*) for the medical examination of any person;
(*f*) without prejudice to paragraph (*e*) above, for the taking and testing of samples of blood from any person.

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person—

(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
(*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court making the order.

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3. Privilege of witnesses

(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—

(*a*) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or
(*b*) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.

(2) Subsection (1) (*b*) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—

(*a*) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
(*b*) conceded by the applicant for the order,

and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(4) In this section references to giving evidence include references to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.

4. Extension of powers of High Court etc. in relation to obtaining evidence for proceedings in that court

Section 49 of the Supreme Court of Judicature (Consolidation) Act 1925 (which enables the High Court to order the issue of a subpoena in special form, enforceable throughout the United Kingdom, for the attendance of a witness at a trial) and the Attendance of Witnesses Act 1854 (corresponding provisions for Court of Session and High Court of Justice in Northern Ireland) shall have effect as if references to attendance at a trial included references to attendance before an examiner or commissioner appointed by the court or a judge thereof in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

Evidence for criminal proceedings

5. Power of United Kingdom court to assist in obtaining evidence for criminal proceedings in overseas court

(1) The provisions of sections 1 to 3 above shall have effect in relation to the obtaining of evidence for the purposes of criminal proceedings as they have effect in relation to the obtaining of evidence for the purposes of civil proceedings except that—

- (*a*) paragraph (*a*) of section 1 above shall apply only to a court or tribunal exercising jurisdiction in a country or territory outside the United Kingdom;
- (*b*) paragraph (*b*) of that section shall apply only to proceedings which have been instituted; and
- (*c*) no order under section 2 above shall make provision otherwise than for the examination of witnesses, either orally or in writing, or for the production of documents.

(2) In its application by virtue of subsection (1) above, section 3 (1) (*a*) and (*b*) above shall have effect as if for the words "civil proceedings" there were substituted the words "criminal proceedings".

(3) Nothing in this section applies in the case of criminal proceedings of a political character.

Evidence for international proceedings

6. Power of United Kingdom court to assist in obtaining evidence for international proceedings

(1) Her Majesty may by Order in Council direct that, subject to such exceptions, adaptations or modifications as may be specified in the Order, the provisions of sections 1 to 3 above shall have effect in relation to international proceedings of any description specified in the order.

(2) An Order in Council under this section may direct that section 1 (4) of the Perjury Act 1911 or section 1 (4) of the Perjury Act (Northern Ireland) 1946 shall have effect in relation to international proceedings to which the Order applies as it has effect in relation to a judicial proceeding in a tribunal of a foreign state.

(3) In this section "international proceedings" means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which, in pursuance of any international agreement or any resolution of the General Assembly of the United Nations, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry or is appointed (whether permanently or temporarily) for the purpose of exercising any jurisdiction or performing any such functions.

9. Interpretation

(1) In this Act—

"civil proceedings", in relation to the requesting court, means proceedings in any civil or commercial matter;

"requesting court" has the meaning given in section 1 above;

"property" includes any land, chattel or other corporeal property of any description;

"request" includes any commission, order or other process issued by or on behalf of the requesting court.

(2) In relation to any application made in pursuance of a request issued by the High Court under section 85 of the County Courts Act 1959 or the High Court of Justice in Northern Ireland under section 58 of the County Courts Act (Northern Ireland) 1959, the reference in section 1 (*b*) above to proceedings instituted before the requesting court shall be construed as a reference to the relevant proceedings in the county court.

(3) Any power conferred by this Act to make an Order in Council includes power to revoke or vary any such Order by a subsequent Order in Council.

(4) Nothing in this Act shall be construed as enabling any court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown.

(5) Except so far as the context otherwise requires, any reference in this Act to any enactment is a reference to that enactment as amended or extended by or under any other enactment.

10. Short title, commencement and extent

(1) This Act may be cited as the Evidence (Proceedings in Other Jurisdictions) Act 1975.

(2) This Act shall come into operation on such day as Her Majesty may by Order in Council appoint.

(3) Her Majesty may by Order in Council make provision for extending any of the provisions of this Act (including section 6 or any Order in Council made thereunder), with such exceptions, adaptations or modifications as may be specified in the Order, to any of the Channel Islands, the Isle of Man, any colony (other than a colony for whose external relations a country other than the United Kingdom is responsible) or any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's Government in the United Kingdom.

BANK SECRECY IN THE ENGLISH-SPEAKING CARIBBEAN AND ATLANTIC REGIONS

BY: Stephen F. Clarke
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Among the various jurisdictions within the West Indies (a term used to refer to the English-speaking colonies and former colonies of the United Kingdom in the Caribbean), Anguilla, Antigua, Barbados, the Cayman Islands, Montserrat, St. Vincent, and the Turks and Caicos regularly appear in the leading surveys of the tax havens of the world.[1] To these jurisdictions, the neighboring Atlantic islands of Bermuda and the Bahamas are also invariably added. Thus, within the arc extending from Bermuda down and over to the Cayman Islands, there are at least nine common law countries that have attracted considerable interest because they impose little or no income, capital gains, or other taxes or because they have laws designed to encourage offshore investments and deposits. Other jurisdictions in the area, such as Jamaica, Trinidad and Tobago, also anxiously seek foreign investment, but they do not compete for offshore banks, insurance companies, and trust funds by offering tax incentives or vehicles to assist foreigners in avoiding taxation in their native countries.

Over the past decade, there has been a tremendous increase in the level of direct investment from the United States in all of the tax havens and particularly in the Western Hemisphere. For example, in the most recent comprehensive review of the field, it is reported that between 1968 and 1978 the level of international deposits held by banks and nonbanks in the Western Hemisphere tax havens increased from $1.5 billion to $159.5 billion.[2] A primary factor in accounting for this growth is the tax advantage of using a tax haven. The study also points out there are other attractions of tax havens. The first of these non-tax reasons for using foreign bnaks is "confidentiality."[3] To quote in full, the report states as follows:

> Secrecy
>
> By definition, all of the jurisdictions with which we are concerned, afford some level of secrecy or confidentiality to persons transacting business, particularly with banks. This secrecy has its origin in either the common law or in statutory law.

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[1] See e.g., W. Diamond, Tax Havens of the World (1982)

[2] R. Gordon, Tax Havens and Their Use by United States Taxpayers—An Overview 41 (1981). This study was commissioned by the Department of Justice, Department of the Treasury, and the Internal Revenue Service.

[3] Id at 23.

> Common law secrecy is found in those jurisdictions which were or still are British Colonies. It derives from the finding of an implied contract between a banker and his customer that the banker will treat all of his customer's affairs as confidential. If violated, an action for damages for breach of contract lies against the banker.
>
> Many jurisdictions have confirmed or strengthened the common law rules by statute, and have added criminal sanctions for breaching secrecy. In many cases the law was strengthened to maintain or improve the particular jurisdiction's competitive position. For example, in 1976 the Cayman Islands, which had strict bank secrecy before, tightened its laws by adding more substantial sanctions against persons divulging most banking and commercial information. This tightening was a reaction to United States v. Field, in which the U.S. court directed a Cayman resident to give testimony concerning bank information before a U.S. grand jury, even though the testimony would violate the bank secrecy laws of the Cayman Islands and would subject him to limited criminal penalties.
>
> Some level of secrecy is a characteristic common to both tax havens and non-tax havens. Most countries do impose some level of protection for banking or commerical information. At the same time, however, many countries will not protect information from a legitimate inquiry from a foreign government, particularly where that inquiry is made under a treaty. Tax havens, however, refuse to breach their wall of secrecy, even where a serious violation of the laws of another country may be involved. The distinction is between unreasonably restrictive rules of bank secrecy which may encourage the commitment of international tax and other offenses, and those which pay due regard to the protection of individual privacy, but which also permit legitimate inquiry in appropriate cases.
>
> Secrecy is most troublesome when a violation of U.S. criminal laws is under investigation. It also presents significant problems to IRS when it attempts to audit legal transactions. The secrecy may be used as an excuse by a taxpayer not to produce records, or it may present real problems preventing IRS access to records.[4]

While generally accurate, the above statement is somewhat misleading in two significant respects. First, the statement that "(m)any jurisdictions have confirmed or strengthened the common law rules by statute, and have added criminal sanctions for breaching secrecy" is not supportable. In fact, the available law from the English-speaking jurisdictions in the Atlantic-Caribbean region indicates that, contrary to popular misconceptions, the only entities having such laws are the independent country of the Bahamas and the British colony of the Cayman Islands. The laws of the other jurisdictions fail to reveal any prohibitions on the divulgence of information relating to a customer's affairs by a bank that are punishable under their criminal laws.

In the Bahamas, bank secrecy is provided for in the following section of the Bank and Trust Company Regulation Act:

> 2. Section 10 of the Banks and Trust Companies Regulation Act, 1965 is repealed and the following section substituted -
>
> 10. (1) No person who has acquired information in his capacity as
> (a) director, officer, employee or agent of any licensee or former licensee;
> (b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of the Bahamas Act, 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

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[4] id at 15-17.

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;
(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor
(e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, or accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except -

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or
(ii) for the purpose of the performance of his duties within the scope of his employment; or
(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall -

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or
(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against the Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or both such fine and imprisonment.[5]

This section was passed in 1980 after a court decision held that the previous section 10, long thought to have provided for bank confidentiality, was actually only applicable to certain government officials and not to banks or bank employees.[6]

The Bahamian bank secrecy law is a blanket type. Rather than providing for a case by case review of foreign requests for confidential information by either a government official or a court, the new section 10 prohibits disclosure in all cases where the customer has not consented to disclosure. Technically, a Bahamian court is not precluded from ordering compliance with the foreign order; however, there are no cooperation or mutual assistance treaties with the United States or any other such laws that would provide the grounds for a Bahamian court to order such compliance.

One major problem with the Bahamian law is that it seems to exempt from its ambit, actions by a bank employee that are within the "performance of his duties." Thus, if a bank official were to comply with a foreign subpoena and release documents or testify as to a customer's affars, it might be said that he was merely fulfilling a normal function and, subsequently, was not guilty of a criminal offense. This point has not been judicially considered to date.

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[5] 1980 Bah. Laws, ch. 3.

[6] Barclays Bank v. McKinney, No. 474 (Bah. S. Ct. 1975).

In addition to the insupportable statement that "many" English-speaking tax havens have enacted bank secrecy laws, there is a second problem arising out of the Gordon study. This involves a lack of appreciation of the difference between the common and criminal laws. The leading English case of Tournier v. National Provincial and Union Bank states that there is a duty of all bank employees not to divulge information relating to their customers' accounts[7] and this rule applies to all of the common law jurisdictions within the Atlantic-Caribbean region. However, this duty is a fundamentally different one from that created by the Bahamian criminal law precisely because there is no automatic penalty for a breach of this duty. A banker can be sued for damages, but the burden of proof is on the plaintiff and there are very few cases where any sums have been recovered. It is also arguable that any disclosure pursuant to a foreign subpoena is exempt under the rule in the Tournier case just as disclosure to the local government is exempt.[8]

The significance of the difference between the common law liability and a criminal liability regarding bank confidentiality should manifest itself in cases where United States judges consider ordering a foreign bank to release or make available information. Under the Bahamian law the facts of the case are basically irrelevant to whether a divulging bank employee is liable to be convicted of a criminal offense. Regardless of the circumstances, that employee is subject to criminal penalties. Under the common law rule however, the circumstances of the case may be extremely relevant. For instance, if divulgence of information by a bank official led to a conviction under foreign tax laws, it is doubtful that a customer could recover any damages. In any event, there are no reported cases where such damages have been awarded in a common law jurisdiction. Therefore, in considering whether to make an order for production of documents in a country where the common law duty of secrecy applies, it is probable that compliance would not subject a foreign bank employee to any penalty for such cooperation. In this sense, the common law rule can be considered to be in a different category from the criminal law statutes in the Bahamas and the Cayman Islands.

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[7] (198-24) 1 K.B. 461 (C.A. 1923).

[8] 1980 Bah. Laws. ch. 3, §1(iii).

In conclusion, bank secrecy has become associated with tax havens. However, only the Bahamas and the Caymans among the Western Hemisphere common law jurisdictions have true bank secrecy laws that seem to prohibit the divulging of information of a local customer's affairs abroad. Furthermore, it is arguable that this situation is not covered under the somewhat ambiguous Bahamian law.

The International Business Companies
(Exemption from Income Tax)
Ordinance, 1967

I ASSENT,
H. Burrowes,
Acting Administrator
23rd February, 1967.

ANTIGUA
NO. 9 of 1967.

An Ordinance to make provision for the exemption from income tax in whole or in part of international business companies which are not trading locally.

(BY PROCLAMATION)

Be it enacted by the Queen's Most Excellent Magesty by and with the advice and consent of the Legislative Council of Antigua, and by the authority of the same as follows: -

1. This Ordinance may be cited as the International Business Companies (Exemption from Income Tax) Ordinance, 1967, and shall be read and construed as one with the Income Tax Ordinance, (hereinafter called the Income Tax Ordinance) and all amendments thereto, and shall come into operation on such day as the Administrator may by Proclamation appoint.

2.1) In this Ordinance -

"exempted company" means an international business company resident in the territory which does not carry on trade in the buying or selling of goods or services in, or originating in, the territory;

"goods" including commodities, products and securities;

"international business company" means a body corporate, engaged in trade, whether incorporated under the laws of the territory or not, in the case of which all of the following conditions are fulfilled;

a) the body corporate is not by any means controlled (whether directly or indirectly) by persons resident in the territory;

b) more than one-tenth of the sums which on a liquidation thereof, would be receivable by holders of share or loan capital would not be receivable (directly or indirectly) by or for the benefit of persons resident in the territory;

c) more than one-tenth of the assets which, on a liquidation thereof, would be available for distribution after the payment of creditors would not be receivable (directly or indirectly) by or for the benefit of persons resident in the territory:

d) more than one-tenth -

i) of the interest payable on its loan and loan capital, if any, and
ii) of the dividends payable on its preference share capital, if any, and
iii) of the dividends payable on its share capital, if any, not being preferences share capital,

is not receivable (directly or indirectly) by or for the benefit of persons resident in the territory;

e) the body corporate does not carry on banking or insurance business in the territory;

"investment company" means a body corporate, whether incorporated under the law of the territory or not, engaged exclusively in the business of buying, selling, holding or managing securities;

"securities" means shares, stock, bonds, notes (other than promissory notes), debentures, debenture stock, units under a unit trust scheme and any other securities prescribed by the Administrator for the purpose of this Ordinance;

"territory" means the Island of Antigua and all dependencies of Antigua;

"the Commissioner" means the Commissioner of Income Tax,

"trade" means every trade, business, manufacture, adventure or concern in the nature of trade or business.

2) A shareholder of an international business company shall not be deemed for the purposes of this Ordinance to be a person resident in the territory by reason only that he visits the territory from time to time for the purpose of supervising the operations of that company.

3.1) The profits or gains of an international business company which is not an investment company shall be exempt from income tax if, within the prescribed time after the expiration of an income year the company satisfied the Commissioner that during the whole of that income year it was an exempted company within the meaning of this Ordinance.

2) In lieu of tax at the rates specified in section 5 of the Income Tax Ordinance, income tax at a reduced rate of two and one half cents on every dollar shall be levied and paid upon the profits or gains of an international business company which is an investment company if, within the prescribed time after the expiration of an income year, the company satisfied the Commissioner that during the whole of that income year it was an exempted company within the meaning of this Ordinance.

4.1) Any dividend paid by an international business company which is not an investment company to a person not resident in the territory out of profits or gains which are exempt from income tax in accordance with subsection (1) of section 3 shall be exempt from income tax.

2) In lieu of tax at the rates specified in the Income Tax Ordinance, income tax at the rate of two and one half cents on every dollar shall, subject to the provisions of that Ordinance, be levied and paid upon any dividend paid by an international business company which is an investment company to a person not resident in the territory out of profits or gains which are liable to income tax at a reduced rate in accordance with subsection (2) of section 3, and the company paying the dividend shall be entitled to deduct out of the dividend the income tax payable thereon in accordance with the subsection.

3) Subject to the provisions of the Income Tax Ordinance, income tax at the appropriate rate specified in or under that Ordinance shall be levied and paid upon any dividend paid by any international business company to a person resident in the territory and the company paying the dividend shall be entitled to deduct income tax therefrom at the rate of forty cents on every dollar thereof.

4) An international business company making deduction of income tax pursuant to subsection (2) or subsection (3) shall be deemed to be collecting tax on behalf of the Commissioner and shall pay to the Commissioner, or to such person as he may direct, the amounts so deducted.

5) Save as otherwise provided in this Ordinance, the provisions of the law relating to income tax shall apply to dividends paid by an international business company.

5. The Administrator may make regulations for the following purposes -

a) to provide for the returns to be submitted and the information to be furnished to the purpose of claiming exemption under this Ordinance;
b) to prescribe any matters required by this Ordinance to be prescribed;
c) generally for giving effect to the purposes of this Ordinance.

6. Except so far as this Ordinance may operate to exempt an international business company from liability to income tax under the law relating to income tax, all the provisions of that law which are applicable to a company shall apply to an international business company.

D.W. HURST,
Speaker.

Passed the Legislative Council this 7th day of February 1967.

LOUNEL STEVENS
Acting Clerk of the Council.

AUSTRIA

Austria has not enacted a "blocking" statute comparable to the Protection of Trading Interest Act of the United Kingdom. However, Austrian law contains many statutory professional secrecy duties, and disclosure in violation of such responsibilities results in criminal liability. 1/ Taken together, these provisions may have the same effect as a "blocking" statute, even though they are not specifically aimed at protection against disclosure to a foreign authority.

Among the more important duties of secrecy are those imposed on attorneys, auditors, and physicians in their relationships with their clients and the duty of secrecy of auditors and directors of corporations with regard to business secrets of the corporation. 2/ Two other far-reaching secrecy provisions were enacted in the late 1970s: the Data Protection Law of 1978 grants everyone a constitutional right in the protection of personal data that are electronically stored; 3/ and the Banking Law of 1979 protects against the disclosure of information pertaining to the relationship between a bank and its client. 4/

In Austrian civil proceedings all these duties of secrecy create the right to refuse testimony or the production of documents. 5/ In Austrian criminal proceedings, only a few of these privileges exist, the attorney-client privilege being the most important. 6/

1/ Secs. 121 and 122, Strafgesetzbuch vom 23. Jänner 1974, Bundesgesetzblatt [BGBl., official law gazette of Austria] No. 60/1974.

2/ O. Leukauff and H. Steininger, Kommentar zum Strafgesetzbuch 797-815 (Eisenstadt, 1979).

3/ Art. 1, Datenschutzgesetz vom 18. Oktober 1978, BGBl., No. 565/1978.

4/ Secs. 23 and 34, Kreditwesengesetz vom 24. Jänner 1979, BGBl., No. 63/1979. A translation of these provisions and a discussion of their effects, as contained in E. Palmer, The Austrian Banking System Under the 1979 Statute 45-55, 94-95, and 105-106 (Library of Congress, 1980) is included as an Appendix.

5/ Secs. 305 and 321, Zivilprozessordnung vom 1. August 1895, Reichsgesetzblatt [RGBl., official law gazette of Austria until 1918] No. 113/1895, as amended.

6/ Secs. 151 and 152, Strafprozessordnung in der Fassung vom 9. Dezember 1975, BGBl., No. 631/1975.

In general, it can be stated that these secrecy protections in Austrian law are effective against a foreign court or authority in the same manner in which they prevail before an Austrian court. Ordinarily, the Austrian courts will grant judicial assistance to a foreign court or authority to the same extent that disclosure can be compelled in an Austrian proceeding of the same type. [7] This cooperative attitude, however, is limited for foreign requests in civil proceedings, in that assistance will be denied if the foreign action or claim is against Austrian public policy. [8] For foreign requests in criminal proceedings, disclosure will be refused not just for public policy reasons, but also to protect Austrian interests. [9] On this basis, Austria may reject the disclosure of Austrian trade and business secrets. [10]

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February 1983

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[7] For requests in civil proceedings: secs. 38-40, Jurisdiktionsnorm vom 1. August 1895, RGBl., No. 111/1895; for requests in criminal proceedings: sec. 51, Auslieferungs- und Rechtshilfegesetz [ARHG] vom 4. Dezember 1979, BGBl., No. 529/1979. For both civil and criminal requests, reciprocity is a prerequisite for assistance by the Austrian authorities.

[8] H. Fasching, 1 Kommentar zu den Zivilprozessgesetzen 255 (Wien, 1959).

[9] Sec. 2, ARHG.

[10] R. Linke, Internationales Strafrecht 19 (Wien, 1981).

Austria – Appendix

THE AUSTRIAN BANKING SYSTEM UNDER THE 1979 STATUTE

By Dr. Edith Palmer

Law Library
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1980

Another expansion of supervisory powers of the Government is revealed in the institution of state comptrollers for large banks, i.e., those with a balance sheet total in excess of 5 billion schillings. For each affected institution, the Minister of Finance must appoint one state comptroller and a deputy. These persons must either be public servants or members of the bar or one of the auditing professions. Once appointed, they are subordinated to the Minister and must report to him annually and whenever problems occur.

The state comptroller must be invited to general and supervisory board meetings of the bank, and he may suspend their resolutions if, in his opinion, they violate law or administrative orders. Strict time limits of one week are set both for an appeal by the bank to the Minister and for his response; if he fails to respond within that time, the resolution remains in force.

Even before enactment of the Banking Statute, state comptrollers existed for savings banks, the Postal Savings Bank, and the National Bank.[127] Extension of this tool to private institutions was resented by the banking industry, since it would have preferred to restrict its application to institutions for which government bodies assume liability, or in which they have a controlling ownership.[128]

Bank Secrecy

One much publicized, novel feature of the Banking Statute is its inclusion of bank secrecy provisions. Austrian bankers have been frank in stressing the economic advantages of their enactment, and they expect from it an increase in international business.[129/] In essence, these provisions create a statutory duty for banks and the circle of persons engaged in banking to keep secret the confidential information received on the basis of the client relationship, except when public interests worthy of protection expressly override this duty, or when secrecy is waived by the client. In view of the transnational implications of national bank secrecy laws and the degree of interest in this subject, a closer look at the purposes and effects of the Austrian provisions may be of interest.

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[127] RV, supra note 6, ad sec. 26.

[128] Raab-KWG, supra note 43, at 100.

Before enactment of the Statute, bank secrecy had existed in Austria by customary law and by banking traditions reaching back to the 16th century. Conceptually, bank secrecy had been explained as deriving from the contractual relationship between client and bank, one characterized by a special degree of trust. Its existence has been asserted by scholars who drew also on West German and Swiss doctrines and case law. (In Austria, the issue has generated little reported case law.) Under this concept, a violation of bank secrecy gave rise to a civil action of damages.[130/] Also, in civil proceedings,

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[129/] Pötzelberger, supra note 100, and many others. Austrian banks have also advertised the new banking secret both at home and abroad. However, some restraint in these practices has been urged: Schinnerer, in Beiträge, supra note 72, at 31. Schinnerer points out that the impression should not be created that Austria intends to become a refuge for illicit moneys. He also raises the possibility that anonymous deposit certificates, frequently mentioned in connection with bank secrecy, may not afford that protection in instances where mere possession of the certificate might not be considered a relationship to the bank.

[130/] Schinnerer-Bankverträge, supra note 121, at 166-179. For German law, see G. Sichtermann, Das Bankgeheimnis (Stuttgart, Deutscher Sparkassenverlag, 1969); H. Schönle, Bank- und Börsenrecht 42-58 (München, Beck, 1976); J. Erhahn, "Bankgeheimnis und Bankauskunft," in Bankrecht 492 (Wiesbaden, Gabler, 1975). The German banking secret has its roots not only in the contractual relationship between bank and client, but also in constitutionally guaranteed human rights: Sichtermann, id. at 11. For Swiss law, see M. Aubert, Das schweizerische Bankgeheimnis (Bern, Stämpfli, 1978).

testimony could be refused by pleading bank secrecy,[131] whereas in criminal proceedings the duty to testify overrode bank secrecy.[132] Nor did bank secrecy exist before the tax authorities: in addition to some special notification duties of banks in tax matters, such as that regarding the assets of a decedent in the custody of banks,[133] there also existed a general duty to disclose information to the tax authorities upon their request.[134] However, anonymous accounts and deposits could be maintained with banks, and these afforded some protection from the tax authorities.[135]

Efforts to create a statutory banking secret date back at least to 1969, when the banking statute draft of that year contained a provision not too different from the one now enacted. At that time it went into effect for the

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[131] Schinnerer, *id.* at 189; sec. 321, para. 1, No. 3, Zivilprozessordnung vom 1. August 1895, *Reichsgesetzblatt* [official law gazette of Austria until 1918], No. 113/1895, as amended.

[132] Secs. 150-152, Strafprozessordnung in der Fassung vom 9. Dezember 1975 [hereafter: StPO] BGBl., No. 631/1975; Schinnerer, *id.* at 180.

[133] Sec. 25, Erbschafts- und Schenkungssteuergesetz 1955 vom 30. Juni 1955, BGBl., No. 141/1955.

[134] Sec. 143, Bundesabgabenordnung vom 28. Juni 1961, BGBl., No. 194/1961, establishes the duty of third persons to testify before the tax authorities with regard to the liability of any taxpayer. Exempt from this duty are persons whose testimony would lead to criminal prosecution or violate a duty of secrecy: sec. 171, *id.* Before adoption of the new Banking Statute, the predominant view was that bank secrecy did not prevail against the tax authorities: F. Reeger *and* G. Stoll, *Kommentar zur Bundesabgabenordnung* 506, 575 (Wien, Orac, 1966).

[135] The German Fiscal Code in effect in Austria from 1938 until recodification in 1961, Reichsabgabenordnung, enacted in Austria on November 11, 1938, *Gesetzblatt für das Land Österreich*, No. 565/1938, contained in its sec. 163 a provision that prohibited accounts under ficticious names and held banks to ascertain the identity of their depositors. This provision was repealed in 1948 in Austria (1. Novelle zur Abgabenordnung vom 8. Juli 1948, BGBl., No. 151/1948) with the intent of encouraging the formation of capital and of freeing it from restrictions: Schinnerer-Bankverträge, *supra* note 121, at 180.

Postal Savings Bank.[136] Another attempt to legislate on bank secrecy was made in the early 1970s, when the Criminal Code was reformed.[137] In conjunction with criminal sanctions for the unauthorized disclosure of professional secrets, primarily of the medical profession, inclusion of bank secrecy provisions in this category was proposed,[138] but it was rejected on the grounds that domestically, at least, no need for it existed. Proponents of bank secrecy were quick to point out the transnational need for criminal sanctions, that is, to protect Austrian banks and their clients from disclosure orders by foreign courts that could be deterred only by criminal sanctions.[139] In discussing the 1978 draft of the Banking Statute, representatives of the banking interests urged the inclusion of a strong protection of the banking secret, while representatives of labor interests were opposed. These divergent views may be responsible for incongruities in the provisions enacted, and for differences of interpretation that have occurred since their enactment.

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[136] Sec. 22, para. 3, Postal Savings Bank Statute, *supra* note 39. The new KWG repealed this provision, and its bank secrecy provisions now apply also to the Postal Savings Bank.

[137] This reform was completed in 1974 with the enactment of a new Criminal Code: Strafgesetzbuch [hereafter: StGB] vom 23. Jänner, 1974, BGBl., No. 60/1974.

[138] The proposed bank secrecy sanction was contained in sec. 127 of the Government draft to the Criminal Code, i.e., Regierungsvorlage, *reprinted in* O. Leukauf *and* H. Steininger, *Kommentar zum Strafgesetzbuch* 601 (Eisenstadt, Prugg, 1974).

[139] Schinnerer-Bankverträge, *supra* note 121, at 167. Although no cases have occurred where foreign courts and administrative agencies sought to compel disclosure from Austrian banks, those that occurred with regard to Swiss and West German banks were viewed in Austria as a danger that should be avoided. A case in point is U.S. v. First National City Bank, 396 F 2nd 897 (2nd Circuit, 1968), wherein the U.S. court upheld contempt measures against a bank under its jurisdiction to induce disclosure from that bank's German branch because the German law provided for no criminal sanctions for violation of bank secrecy, but merely civil liabilities.

The Statute contains two provisions on bank secrecy. In section 23 it establishes the duty of secrecy, the circle of persons bound by it, and the exceptions from this duty. In section 34 it affords criminal sanctions for its violation. The Statute does not provide any civil remedies for violations of bank secrecy. These remain governed, as was the case before, by the provisions of the Civil Code on delictual liability. For merely negligent disclosure of bank secrets, however, liability of the banks may be excluded by virtue of their General Terms of Doing Business.[140]

The circle of persons who are subject to the statutory duty of bank secrecy is very broad. It includes banks, their associates, the members of boards and similar instrumentalities, and all bank personnel. Section 23 (1) describes bank personnel as "all persons working at the institution." This encompasses not only employees but also persons working with the bank on any other basis. The banking authorities must observe official secrecy (also sanctioned by criminal provisions) on all matters subject to bank secrecy.[141]

Some conflicts of interest may occur between corporation law and bank secrecy. Section 23 includes all associates and the members of instrumentalities of banks under the duty of bank secrecy. This raises the issue of whether or not corporate shareholders and holders of shares in cooperatives and limited liability companies are under a duty to observe bank secrecy. The broad wording of section 23 indicates that this is the case if the general meeting of these persons is to be regarded as an instrumentality. For owners of cooperatives and limited liability companies, a case for their inclusion can also be made on the basis of their position as associates on a par with partners in a partnership. The disclosure of bank secrets to these groups of persons may pose a problem because of the large number of persons involved. This is particularly true of general meetings of corporations, and further problems may be created because of the publicity surrounding protocols. However, shareholders and holders of interests in limited liability companies and cooperatives do have information rights. It appears that management in such instances will have to balance carefully the interests involved.[142]

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[140] Schinnerer-Bankverträge, *id.* at 177. The basic provision for liability for damage inflicted is sec. 1295, Civil Code, i.e., Allgemeines bürgerliches Gesetzbuch, promulgated June 1, 1811, JGS, No. 946/1816; translated into English by P. Baeck, *The General Code of Austria* (Dobbs Ferry, N.Y., Oceana, 1972). A recent commented edition is H. Kapfer, *Das Allgemeine bürgerliche Gesetzbuch* (Wien, Manz, 1976).

According to Schinnerer, *supra* note 129, the contractual banking secret that pre-existed the Statute still exists, even though its scope will differ only rarely from the statutory duty. It appears that an action for damages could be based on violation of either the statutory or the contractual duty of bank secrecy.

[141] Sec. 310, StGB, *supra* note 137. Also, the tax authorities must observe secrecy: secs. 251 and 252, i.e., Finanzstrafgesetz vom 26. Juni 1958, BGBl., No. 129/1958.

Another consequence of the wording of section 23 is that it protects only the secrecy of transactions of a properly licensed bank. Transactions made with an institution before licensing are not protected, but become protected retroactively upon obtainment of the license. No protection is afforded to the unlicensed transactions of other "non-banks," such as loan sharks.[143]

Protected by section 23 from disclosure or other utilization are secrets entrusted or made accessible to the circle of persons bound to duty on the basis of the client relationship. Exactly what a "secret" is, is not further defined in the Statute. But the explanations in the Government draft describe it as "facts known only to a limited number of persons, the disclosure of which would be detrimental to the client."[144] The explanations further state that even facts otherwise worthy of protection are not protected if knowledge of them is obtained outside the bank-client relationship.

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[142] Kastner, *supra* note 72; Schinnerer, *supra* note 129.

[143] Schinnerer, *id.*

Section 23 also lists the exceptions from bank secrecy. This duty does not exist in criminal, administrative tax crime, or inheritance proceedings. Nor does the duty exist when it is expressly waived by the client or when general information is sought from banks about the economic circumstance of an entrepreneur. In all these instances, bank secrecy may not be pleaded to avoid a duty to give information or to testify. Consequently, in criminal proceedings the duty to testify overrides bank secrecy, but in civil proceedings banking secrets are privileged information, unless secrecy is waived by the client. In the drafting process and since enactment of the Statute, some controversy has surrounded this catalog of exceptions, both as to their scope and to their exhaustive enumeration.

The exceptions of criminal proceedings and tax crime proceedings were criticized by banking interests for several reasons. Whereas the wording "in connection with...proceedings" indicates that disclosure is permissible only after a criminal proceeding has been instituted,[145] this wording might permit the disclosure of secrets concerning persons other than the accused.[146] Furthermore, the banking associations feared that the inclusion of tax crime proceedings among the exceptions might induce the tax authorities to institute criminal proceedings without proper cause, since otherwise banking secrets are now out of reach of these authorities. Another issue not explicitly dealt with in this exception is legal assistance to foreign courts in criminal matters. The opinion has been ventured that such assistance could be given only if an assistance treaty referred specifically to section 23.[147]

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[144] RV, *supra* note 6, ad sec. 23.

[145] Heller-KWG, *supra* note 55, at 78.

[146] Raab-KWG, *supra* note 43, at 90.

The dispute on the exhaustive enumeration touches primarily on several provisions of tax law compelling disclosure of information held by banks to the tax authorities. Among them are: a provision of the Inheritance Tax Statute compelling disclosure of a decedent's assets to the tax authorities,[148] and several provisions of the Income Tax Code concerning tax benefits and subsidies for savings accounts to be used for the construction or purchase of housing.[149] Since section 23 of the Banking Statute is silent on their inclusion or exclusion, arguments in favor of secrecy can be made on the grounds that the Banking Statute repealed previous contradictory provisions; arguments against secrecy can be made on the grounds that the more specific provisions of the tax statutes survived the more general secrecy provisions of the Banking Statute. The explanations to the Government draft insist on the exhaustive nature of the catalog of exceptions of section 23, but they affirm the continued existence of the additional disclosure duties described above.[150]

The criminal provision of section 34 of the Statute makes use or disclosure of banking secrets punishable by imprisonment up to one year or a fine. Perhaps it is the range of punishment that has given rise to Austrian comments that the Austrian bank secrecy provision is stricter than Switzerland's.[151/] However, the Austrian provision has two flaws not found in Swiss law[152/] with regard to maximum secrecy protection: a violation is punishable only if there is a specific intent to inflict harm or obtain a benefit, and prosecution occurs only upon a complaint by the victim.

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[147] Schinnerer, "Das Bankgeheimnis," in Probleme, supra note 7, at 170.

[148] Supra note 133.

[149] Sec. 18, para. 1, No. 3a, and sec. 108, para. 6, EStG, supra note 94.

[150] Heller upholds these additional disclosure duties, supra note 55, at 77, whereas Schinnerer denies them, supra note 129.

The specific intent for which the provision calls is described in the general principles of the Criminal Code. It requires that the perpetrator must be crucially motivated by the desire to achieve the intended result.[153/] In the Government draft, disclosure of banking secrets was punishable even without the qualifying specific intent, and its existence merely produced an

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[151/] Pötzelberger, *supra* note 100.

[152/] Swiss bank secrecy is protected by article 47, Bundesgesetz über die Banken und Sparkassen vom 8. November 1934, in der Fassung vom 1. Juli 1971, *Bundesblatt* [official gazette of Switzerland] I, p. 1144 (1970), as follows:

> *Art. 47*. 1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 francs.
> 2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.
> 3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.
> 4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.
>
> ---
>
> Translation from Union Bank of Switzerland, *Federal Law Relating to Banks and Savings Banks* 21 (Zurich, 1972).

[153/] Schinnerer, *supra* note 129, at 36; sec. 5, para. 2, StGB, *supra* note 137, as interpreted *in* E. Foregger *and* E. Serini, *Strafgesetzbuch* 18 (Wien, Manz, 1975).

increased punishment of imprisonment up to 1 year, instead of the one of 6 months otherwise provided.

Another change made after the Government draft was the inclusion of the use of banking secrets as a punishable circumstance. It was inserted to make the bank secrecy provision parallel the professional secrecy provision of the Criminal Code.[154/] Making the use of banking secrets punishable raises the issue of action on inside information, a topic not yet developed in Austrian law.[155/] Furthermore, the change may make it more difficult to draw the line between unauthorized use and permissible information given with regard to the economic situation of clients.

Another parallel construction to the secrecy provision of the Criminal Code is the inclusion of bank secrecy among the complaint offenses. This path was chosen because the legislator felt that the provision primarily serves the protection of private interests. The procedural rules for complaint offenses grant the injured person only a 6-week period (from the time of knowledge of the deed and its perpetrator) to submit a complaint to the criminal courts. Furthermore, the complainant must act as prosecutor throughout the trial; otherwise his waiver of prosecution may be presumed. He may request, however, that the public prosecutor act on his behalf.[156/]

The lack of primary, official prosecution for bank secrecy violations may be viewed as a shortcoming of the Austrian provision on bank secrets,

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[154/] Sec. 121, StGB, supra note 137.

[155/] Schinnerer-Bankverträge, supra note 121, at 167.

[156/] Sec. 46, StPO, supra note 132; E. Foregger and E. Serini, Strafprozessordnung 62-66 (Wien, Manz, 1975).

weakening its capacity to protect against foreign requests for disclosure. This may enable a foreign court to exert pressure on a client of an Austrian bank over whom the foreign court has jurisdiction, thus inducing him to refrain from prosecuting. By the same token, a foreign court may ask him to waive his banking secret. However, the bank may still assert its duty of secrecy, since not only is the client protected but also any person whose interests in secrecy are violated.[157] Complete secrecy is guaranteed only by factually and legally anonymous accounts, and these are quite popular in Austria.

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[157] Schinnerer, *supra* note 129, at 37.

BERMUDA

In reply please
quote the date of
this letter and the
following reference
AG9/58B

10th June, 1980.

Ms. Jo Ann Harris,
Chief, Fraud Section,
Criminal Division,
U.S. Department of Justice,

Dear Ms. Harris,

I acknowledge receipt of your letter of May 28th, 1980.

With respect to your question concerning the former bank employee I trust the following will be of some assistance.

There is in Bermuda no privilege of bank employees. Only section 59 of The Evidence Act, 1905 is relevant. That section provides as follows:

> "A banker or officer of a bank shall not, in any cause, arbitration or proceeding in which evidence may be given, to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause."
> (Underlining added.)

Thus, if the former employee is being called as a witness to testify as to his personal knowledge of the parties, or any conversations he may have had with them, the above quoted section is inapplicable.

In my opinion therefor, the former bank employee referred to in your said letter would not be in breach of Bermudian law if he testified as to his personal knowledge. Section 59 only relates to the compellibility of a banker or officer to produce or testify as to bank records.

Yours truly,

S.M. Froomkin, Q.C.,
Solicitor General.

SMF:vb

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CAYMAN ISLANDS

THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) (AMENDMENT) LAW, 1979

ARRANGEMENT OF SECTIONS

Section

1. Short title
2. Amendment of section 2 of the Confidential Relationships (Preservation) Law Law 16 of 1976
3. Amendment of section 3 of the principal Law
4. Addition of a new section 3A to the principal Law
5. Amendment of section 4 of the principal Law
6. Repeal of section 5 of the principal Law

CAYMAN ISLANDS

Law 26 of 1979

L.S.

I assent

T. RUSSELL
Governor

2nd October, 1979

A LAW to amend the Confidential Relationships (Preservation) Law (Law 16 of 1976)

ENACTED by the Legislature of the Cayman Islands.

Short title.

1. This Law may be cited as the Confidential Relationships (Preservation) (Amendment) Law, 1979.

Amendment of section 2 of the Confidential Relationships (Preservation) Law. Law 16 of 1976

2. Section 2 of the Confidential Relationships (Preservation) Law (hereinafter referred to as the principal Law) is hereby amended by deleting the definition "entitled to possession of confidential information".

Amendment of section 3 of the principal Law.

3. Section 3 of the principal Law is hereby amended as follows –

(a) in subsection (1) thereof, by the substitution for the word "This" at the beginning thereof, of the words "Subject to subsection (2), this"; and

(b) by the repeal of subsection (2) and the substitution of the following new subsection therefor –

"(2) This Law has no application to the seeking, divulging, or obtaining, of confidential information –

(a) in compliance with the directions of the Grand Court pursuant to section 3A;

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(b) by or to –

(i) *any professional* person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(ii) a constable of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the jurisdiction;

(iii) a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws; or

(iv) the Financial Secretary, the Inspector or, in relation to particular information specified by the Governor, such other person as the Governor may authorise;

(v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;

(vi) the relevant professional person with the approval of the Financial Secretary when necessary for the protection of himself or any other person against crime; or

(c) in accordance with the provisions of this or any other Law.".

Addition of a new section 3A to the principal Law.

4. The principal Law is hereby amended by the addition, immediately following section 3, of the following new section –

"Directions regarding the giving in evidence of confidential information.

3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of the Grand Court sitting alone and *in camera*. At least seven days' notice of any such application shall be given to the Attorney General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney

General may appear as *amicus curiae* at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.

(3) Upon hearing an application under subsection (2) a Judge shall direct –

(a) that the evidence be given; or

(b) that the evidence shall not be given; or

(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguarded.

(4) In order to safeguard the confidentiality of a statement, answer or testimony ordered to be given under subsection (3) (c) a Judge may order –

(i) divulgence of the statement, answer or testimony to be restricted to certain named persons;

(ii) evidence to be taken *in camera*; and

(iii) reference to the names, addresses and descriptions of any particular persons to be by alphabetical letters, numbers or symbols representing such persons the key to which shall be restricted to persons named by him.

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(5) Every person receiving confidential information by operation of subsection (2) is as fully bound by the provisions of this Law as if such information had been entrusted to him in confidence by a principal.

(6) In considering what order to make under this section a Judge shall have regard to –

(a) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim;

(b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy under this Law;

(c) in any criminal case, the requirements of the interests of justice.

(7) In this section, unless the context otherwise requires –

"court" bears the meaning ascribed to it in section 2 of the Evidence Law; Law 13 of 1978.

"given in evidence" and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding;

"proceeding" means any court proceeding, civil or criminal and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.".

Amendment of section 4 of the principal Law

5. Subsection (1) of section 4 of the principal Law is hereby amended as follows –

(i) in paragraph (a) (ii) thereof, by deleting the words "to any person not entitled to possession thereof"; and

(ii) in paragraph (b) thereof, by deleting the words "to which he is not entitled".

Repeal of section 5 of the principal Law.

6. Section 5 of the principal Law is hereby repealed.

Passed the Legislative Assembly this 6th day of September, 1979.

T. RUSSELL
President

ALINE WOOD
Acting Clerk of the Legislative Assembly

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BANK SECRECY - COSTA RICA

[TRANSLATION - SPANISH]

[SOURCE: H. Zürcher, Código de Comercio (José Lehmann Editores, 1981)]

Art. 265. No authority may inquire whether accounting records are correctly maintained, nor may it investigate or examine such records. Likewise, they may not order the disclosure, surrender or general review of records, correspondence, and other papers and documents, except in the cases of bankruptcy or liquidation. Disclosure of commercial records and documents may be viable under all other circumstances only by order of competent judicial authorities, by petition of a legitimately interested party or on the court's own initiative when the person or corporation to whom the information belongs either have an interest or may be liable in regard to an action before the court.

Examinations [of records, documents, etc.] must be conducted on location, at the place of the owner's establishment and in his or her presence or in the presence of his or her designated legal representative. Examiners must limit themselves to copying entries or documents found to be related to the case in question.

Special records, registries, and any other supporting material kept by the owner under investigation may be subject to examination on the same preceding terms.

Art. 266. Audits conducted by the Directorate General of Direct Taxation [Direccion General de la Tributacion Directa] are excluded from the preceding restriction when performed strictly for fiscal reasons.

Art. 615. Bank accounts are confidential. Information on accounts may only be provided when so authorized by the principal in writing or by order of a competent judicial authority. Audits conducted by the General Auditor of Banks [Auditoria General de Bancos] in fulfillment of its legal responsibilities are exempted from the preceding principle. Revisions of bank accounts by agencies of the Treasury are forbidden.

Prepared by Rubens Medina
Chief, Hispanic Law Division
Law Library, Library of Congress
May 1982

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WASHINGTON, D.C. 20540

Law Library
Hispanic Law Division

BANK SECRECY - DOMINICAN REPUBLIC

[TRANSLATION - SPANISH]

[SOURCE: General Law on Banks No. 708 of April 14, 1965, Gaceta Oficial, April 19, 1965]

Art. 33. Banks have the obligation to give access to their accounting records and documents justifying their operations to the Superintendant of Banking and to their employees.

Art. 34. The data collected by the Superintendent [of Banking] will be strictly confidential. Revealing any information obtained in the performance of their duties by officials and employees will be penalized with separation without prejudice to other applicable penalties. This prohibition does not impede the publication of information of a general character or of consolidated banking statistics in the form prescribed by the law and the Monetary Board [Junta Monetaria] or the fulfillment of paragraphs c) and d) of Article 6 of this law.

[SOURCE: Código Penal (4. ed. Santo Domingo, Editorial Caribe, 1962)]

Art. 378. Any person who, for the purposes of discovering another's secrets, seizes his papers or letters and divulges them, will be penalized with 3 months to one year imprisonment and a fine of 25 to 100 pesos.

If the person does not divulge [the information], the penalty is reduced by half. These penalties are not applicable to spouses, parents, guardians or their representatives in regard to the papers or letters of their spouses or minors who are dependent on them or under their guardianship.

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May 1982

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BANK SECRECY - EL SALVADOR

[TRANSLATION - SPANISH]

[SOURCE: Código de Comercio de la República de El Salvador (2. ed. San Salvador, Editores Centro Gráfico, ca. 1980)]

Art. 1185. Banks are obligated to keep absolute confidentiality concerning their clients' transactions except when otherwise provided by law. Violation of this obligation makes them liable for damages.

Prepared by Rubens Medina
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May 1982

FRANCE

In 1980 France passed a law concerning the communication of documents and information of an economic, commercial, or technical nature to foreign physical and legal entities. * This law forbids, except if there are international treaties or agreements to the contrary, any person or legal entity residing in France from communicating or supplying either in writing or orally or under any other form to any foreign public authorities, documents or information of an economical, commercial, industrial, financial, or technical nature the communication of which would harm the sovereignty, security, and essential economic interests of France or its public order as outlined by the administrative authorities. These regulations apply to the gathering of evidence in the same fields in the process of answering civil and administrative court proceedings.

Prepared by Dr. M. Tahar Ahmedouamar
Senior Legal Specialist
European Law Division
Law Library, Library of Congress
February 1983

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* Law No. 80-538 of July 16, 1980, Journal officiel, July 17, 1980, p. 1799.

FEDERAL REPUBLIC OF GERMANY

The conditions for giving information on a corporation's affairs are provided for in section 131 of the Stock Corporation Law of September 6, 1965 (Bundesgesetzblatt I, p. 1185) as amended.* This provision authorizes the Board of Management to give shareholders (stockholders), upon their request, information on the business affairs of the corporation required "to form an appropriate opinion on the subjects on the agenda" of the general meeting of the stockholders.

This provision does not mention any other persons than stockholders who are authorized and entitled to receive such information. Therefore, it may be assumed that persons who are not stockholders are excluded from receiving such information from the Board of Management.

In certain cases the Board of Management may refuse to give the information requested, even to stockholders. Such cases are listed in paragraph (3) of section 131 of the Stock Corporation Law. According to this provision, the information may be refused if, among other reasons, it may cause considerable damage to the corporation or to another enterprise connected with it.

The Board of Management may also refuse the information if the "Board of Management would violate penal provisions by rendering the information."

Section 404 of the same Law sanctions by imprisonment up to one year or a fine, or both, the unauthorized disclosure of a trade or business secret to persons not entitled to receive it by the members of the Board of Management or by other officials of the corporation.

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* The German text of the Law and its English translation are published in: R. Mueller and E. Galbraith, The German Stock Corporation Law (Frankfurt am Main, Fritz Knapp Verlag, 1966).

Photocopies of the pertinent provisions of the Stock Corporation Law are appended.

Prepared by Dr. William Sólyom-Fekete
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February 1983

LAWS OF HONG KONG

BANKING ORDINANCE

CHAPTER 155

REVISED EDITION 1981

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HONG KONG

53. (1) Every person to whom this subsection applies— Secrecy.

(*a*) shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the exercise or performance of any function or duty under this Ordinance;

(*b*) shall not communicate any such matter to any person other than the person to whom such matter relates; and *(Amended, 84 of 1975, s. 6)*

(*c*) shall not suffer or permit any person to have access to any records in the possession, custody or control of any person to whom this subsection applies,

except as may be necessary for the exercise or performance of such function or duty or for carrying into effect the provisions of this Ordinance. *(Replaced, 65 of 1971, s. 3)*

(1A) Subsection (1) shall apply to—

(*a*) any public officer;

(*b*) any person authorized or employed by the Commissioner under section 4A;

(*c*) any person appointed under section 13(1)(ii), or by order of the Governor in Council under section 14(1)(ii), to advise a bank in the proper conduct of its business;

(*d*) any person who has assumed control of the business of a bank pursuant to a direction under section 13(1)(iii) or an order of the Governor in Council under section 14(1)(ii); and

(*e*) any person employed by or assisting a person to whom this subsection applies by virtue of paragraph (*b*), (*c*) or (*d*), *(Added, 84 of 1975, s. 6)*

who exercises or performs any function or duty under this Ordinance. *(Added, 65 of 1971, s. 3)*

(1B) Where under section 13(1)(iii) or under section 14(1)(ii) the Commissioner assumes control of and carries on the business of a bank or any other person is directed so to do, subsection (1) shall not apply if the Commissioner or such other person is required to comply with a notice to furnish returns and information under section 51 of the Inland Revenue Ordinance. *(Added, 65 of 1971, s. 3)* (Cap. 112.)

(2) No person who exercises any function or performs any duty in the course of an examination or investigation under section 15 or who receives reports, returns or information submitted under section 15, 38 or 39 shall be required to produce in any court any book, account or other document whatsoever or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his functions or duties under this Ordinance, except as may be necessary in the course of a prosecution for any offence or of a winding-up by the High Court under section 55. *(Amended, 26 of 1967, s. 49; 92 of 1975, s. 59 and 27 of 1981, s. 17)*

Breach of secrecy.

60. Any person who—

(*a*) contravenes section 53(1); or

(*b*) aids, abets, counsels or procures any person to contravene section 53(1),

shall be guilty of an offence and shall be liable—

(i) on conviction on indictment to a fine of $100,000 and to imprisonment for 2 years; or

(ii) on summary conviction to a fine of $50,000 and to imprisonment for 6 months.

(Replaced, 27 of 1981, s. 20)

Prohibition on receipt of commission by staff.

62. Any director or employee (other than a compradore) of a bank, who asks for or receives, consents or agrees to receive any gift, commission, emolument, service, gratuity, money, property or thing of value for his own personal benefit or advantage or for that of any of his relatives, for procuring or endeavouring to procure for any person any advance, loan, financial guarantee or credit facility from that bank or the purchase or discount of any draft, note, cheque, bill of exchange or other obligation by that bank, or for permitting any person to overdraw any account with that bank, shall be guilty of an offence and shall be liable—

(*a*) on conviction on indictment to a fine of $100,000 and to imprisonment for 5 years; or

(*b*) on summary conviction to a fine of $50,000 and to imprisonment for 2 years.

(Amended, 26 of 1967, s. 56; 27 of 1969, s. 4 and 27 of 1981, s. 22)

Criminal liability of directors and managers.

63. (1) Every director and every manager of a bank which contravenes section 18 shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $500,000 and to imprisonment for 5 years and, in the case of a continuing offence, to a further fine of $5,000 for every day during which the offence continues.

TRANSLATION FROM THE GERMAN

LIECHTENSTEIN

BANK AND SAVINGS BANK LAW OF DECEMBER 21, 1960

Art. 47

1) Whoever intentionally

    a) . . .

    b) as an organ, officer, bank employee, auditor or auditor's aide, member of the banking commission, or officer or employee of its secretariat shall infringe the duty of secrecy or divulge a professional secret, or whoever induces one to do so, or attempts to induce another to do so,

    shall be punished for the offense by a fine up to twenty thousand Francs or by imprisonment up to six months, or both.

2) When acting negligently, the perpetrator shall be punished for the offense by a fine up to ten thousand Francs.

Translated by Dr. George E. Glos
Assistant Chief
European Law Division
Law Library, Library of Congress
February 1983

TRANSLATION FROM THE FRENCH

LUXEMBURG

LAW ON CREDIT INSTITUTIONS OF APRIL 23, 1981

Art. 16. In derogation of article 458 of the Criminal Code, which prohibits administrators, members of the board of directors and the board of supervision, managers, and other employees of institutions referred to in article 1 of this law from revealing secrets confided to them in their capacity, persons who manage such institutions may disclose to any person who holds at least one-half of the capital or the funds of the institution information concerning

a) the amount, the form, and the due date of loans granted to a debtor, if the total of the loans exceeds a certain amount or a coefficient with respect to certain elements in the institution's balance sheet;

b) the amount, the form, and the due date of obligations toward another credit institution, if the total of these obligations exceeds a certain amount or a coefficient with respect to certain elements in the institution's balance sheet.

The amounts and coefficients referred to in a) and b), as well as in that case the modality of the disclosure, shall be determined in a grand-ducal regulation.

Translated by Dr. George E. Glos
Assistant Chief
European Law Division
Law Library, Library of Congress
February 1983

[L.S.]

I ASSENT,

G. WYN JONES,
Governor.
25th March, 1980.

MONTSERRAT.

NO. 5 OF 1980

AN ORDINANCE TO REGULATE THE DIVULGENCE OF INFORMATION IMPARTED UNDER CONDITIONS OF PROFESSIONAL CONFIDENCE.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council of Montserrat and by the authority of the same as follows:–

1. This Ordinance may be cited as the Confidential Information Ordinance, 1980. Short Title.

2. In this Ordinance, unless the context otherwise requires – Interpretation.

"bank" and "financial institution" have the meanings respectively ascribed to those terms by section 2 of the Banking Ordinance, 1978; No. 14 of 1978.

"confidential information" means information received by a professional person from or in respect of a principal concerning any property in which the principal has an interest and which the recipient of such information is not authorised by the principal to divulge;

"divulge" means without the authority of the principal, express or implied, to disclose or communicate to any person not entitled to such disclosure or communication and includes unauthorised communication to persons at large;

"normal course of business" means the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal, including compliance with all relevant laws and legal procedures and the routine exchange of information between financial institutions;

"principal" means a person who employs or instructs a professional person in the normal course of business on matters relating to any property of the principal;

"professional person" means a bank or other financial institution, a barrister or solicitor, an accountant, a real estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the foregoing descriptions and whether or not licensed or authorised to act in that capacity and every person subordinate to or in the employ or control of such person or institution for the purpose of his or its professional activities;

"property" means every present, contingent and future interest or claim, direct or indirect, legal or equitable, positive or negative, in any money's worth, or any real or personal property, (movable or immovable), and all rights and securities thereover and all documents and things evidencing the same or relating thereto;

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"real estate agent" has the meaning ascribed to that term by section 3 of the Real Estate Agents (Registration) Ordinance, 1972. No. 1 of 1972.

Application and scope.

3.(1) Subject to subsection (2) this Ordinance shall apply to all confidential information as defined in this Ordinance which originates in or is brought into the Colony and to all persons coming into possession of such information, whether professional persons or not.

(2) This Ordinance shall not apply to the seeking, divulging or obtaining of confidential information –

(a) in compliance with directions of the High Court given in accordance with the provisions of section 4;

(b) by or to a professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(c) by or to a police officer of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the Colony;

(d) by or to a police officer of the rank of Inspector or above, specifically authorised in that behalf by the Governor, and investigating an offence committed or alleged to have been committed outside the Colony which, if committed in the Colony, would be a criminal offence;

(e) by or to the Minister responsible for finance, the Financial Secretary, or, in relation to particular information specified by the Governor, such other person as the Governor may authorise;

(f) by or to a bank in any proceedings, cause or matter when and to the extent that it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank done on behalf of or with, its customers;

(g) by or to a professional person on the authority of the Governor when such course is deemed necessary for the prevention of crime;

(h) generally, in accordance with the provisions of this or any other Ordinance.

Directions by High Court.

4.(1) Whenever a person intends or is required to give in evidence in, or in connection with any proceeding being tried, inquired into or determined by any court, tribunal or other authority, any confidential information within the meaning of this Ordinance, he shall before doing so apply for directions and any adjournment necessary for that purpose shall be granted.

(2) An application for directions under subsection (1) shall be made to and heard and determined by, a Judge of the High Court sitting alone and in camera. At least seven days' notice of such application shall be given to the

Attorney General and, if the Judge so orders, to any person within the Colony who is a party to the proceedings in question. The Attorney General may appear as amicus curiae at the hearing of the application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either in person or by counsel.

(3) Upon hearing an application under subsections (1) and (2) the Judge shall direct –

(a) that the evidence be given; or

(b) that the evidence be not given; or

(c) that the evidence be given subject to conditions to be specified by him whereby the confidentiality of the information will be safeguarded.

(4) In order to safeguard the confidentiality of evidence ordered to be given under subsection (3)(1) a Judge may order one or more of the following:–

(a) that divulgence of the evidence be restricted to certain named persons;

(b) that the evidence be taken in camera;

(c) that reference to names, addresses and descriptions of particular persons be by alphabetical letters, numbers or symbols representing such persons, the key to which shall be restricted to persons named by the Judge.

Offences and penalties.

5.(1) Subject to the provisions of section 3(2), any person who –

(a) being in possession of confidential information however obtained –

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it;

(b) wilfully obtains or seeks to obtain confidential information to which he is not entitled,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment not exceeding 2 years or to both such fine and such imprisonment.

(2) Any person who commits an offence under subsection (1) and receives or solicits on behalf of himself or another person in the course of such offence any reward from any person shall be liable to a further fine not exceeding $5,000 or to imprisonment for a term not exceeding 2 years or to both such fine and such imprisonment and also to forfeiture of the reward if it was received by him.

(3) Any person in possession of confidential information who without the consent of the principal makes use thereof for the benefit of himself or another shall be guilty of an offence and liable on summary conviction to the penalty prescribed in subsection (2) and for that purpose any profit accruing to such person out of such transaction shall be deemed to be a reward.

(4) Any professional person, entrusted as such with confidential information, who commits an offence under subsection (1), (2) or (3) in respect of such information shall be liable to double the penalty prescribed in each of those subsection respectively.

(5) Subject to the provisions of section 3(2), any bank which gives a credit reference in respect of a customer without the express authority of such customer shall be guilty of an offence under subsections (1) and (4) hereof.

(6) Every person who receives confidential information by virtue of the provisions of section 4(2) shall be as fully bound by the other provisions of this Ordinance as if such information were entrusted to him in confidence by a principal.

Regulations.

6. The Governor-in-Council may make regulations for the administration of this Ordinance.

Attorney General's consent.

7. No prosecution may be instituted under this Ordinance without the express consent in writing of the Attorney General.

H.A. FERGUS,
Speaker.

Passed the Legislative Council this 17th day of March, 1980.

D.B. BRAMBLE,
Clerk of the Council.

MONTSERRAT PRINTERY LTD.

BANK SECRECY IN THE NETHERLANDS ANTILLES

BY: Joyce Darilek
Senior Legal Advisor
European Law Division, Library Of Congress

In the Netherlands Antilles, there are no specific provisions that regulate bank secrecy. However, in practice bank secrecy does exist because the banks refuse to divulge information to anyone on the basis of articles 285 and 286 of the Criminal Code. A translation of these articles follows:[1]

> Art. 285. 1. Whoever intentionally discloses any secret that he is obligated to keep by virtue of his present or previous office shall be punished by imprisonment up to 6 months or a fine up to 600 guilders.
>
> 2. If this crime is committed against a specific person, it shall be prosecuted only upon his complaint.
>
> Art. 286. 1. Whoever intentionally discloses particulars where secrecy was imposed upon him concerning a commercial or industrial enterprise with which he is or was employed shall be punished by imprisonment up to 6 months or a fine up to 600 guilders.
>
> 2. Whoever deliberately violates articles 135, paragraph 2, of the Commercial Code shall receive the same punishment.
>
> 3. Prosecution shall take place only upon (receipt of) a complaint from the directors of the enterprise.

Further, the refusal to give out information to anyone, including government agencies, is based on a lack of provisions in the legislation on taxation that would oblige a bank to disclose information to a government agency.

It is uncertain how long this situation will remain because the Netherlands, the Netherlands Antilles, and the United States are in the process of renegotiating their double taxation treaty. In the course of these renegotiations, the Netherlands Antilles has proposed abolishment of bank secrecy for U.S. citizens.

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[1] These articles were translated from: Wetboek van strafrecht voor de kolonie Curacao (now extended to the Netherlands Antilles), edited by D. de Gaay Fortman ('s-Gravenhage, Algemeene Landesdrukkerij, 1936). Insofar as could be determined, there have been no changes in these articles.

[2] Article 135, paragraph 2, of the Commercial Code states:

> Whatever comes to the notice of the persons charged with the investigation concerning the affairs of the corporation they are not allowed to disclose beyond the scope of their mandate.

Translated from: S.W. van der Meer, Corporate Law of the Netherlands and of the Netherlands Antilles (7th ed. Zwolle, Holland, W.E.J. Tjeenk Willink B.V., 1979).

NORWAY

Insofar as can be ascertained, Norway has not passed legislation that specifically prohibits the disclosure of information or documents requested by a foreign court or authority. However, in a number of situations such transfer of information or documents may be prohibited by legislation that cannot be described as "blocking statutes."* For instance, section 36 in Norwegian Statute No. 48 of June 9, 1978, on Personal Data Registers prohibits the transfer abroad of certain registers, and of the gathered information on which they are based, without a permit from the Norwegian Government. Furthermore, when Norwegian courts and authorities normally provide such information to the United States, this is based merely on comity and not on any international agreements.

Prepared by Dr. Finn Henriksen
Senior Legal Specialist
European Law Division
Law Library, Library of Congress
February 1983

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* C. Canenbley, Enforcing Antitrust Against Foreign Enterprises VII (Deventer, The Netherlands, 1981).

BANKING LAW OF PANAMA

Panama, Rep. of Panama, October 1981

COURTESY TRANSLATION OF THE OFFICIAL TEXT IN THE SPANISH LANGUAGE

TITLE I

National Banking Commission

CHAPTER 1

General Provisions

Article 3) — The National Banking Commission is created and assigned to the Ministry of Planning and Economic Policy.

Article 4) — The Commission shall have the following objectives, aside from those assigned by this Cabinet Decree:

a) To insure that the solidity and efficiency of the Banking System is maintained so as to promote monetary and credit conditions conducive to the stability and sustained growth of the national economy.

b) To strengthen and promote the proper conditions for the development of Panama as an international financial center.

CHAPTER II

Organization

Article 5) — The Commission shall be composed of seven (7) members with a right to speak and vote, as follows:

a) The Minister of Planning and Economic Policy who will preside over it;

b) The Finance and Treasury Minister

persons to whom its administration is entrusted, shall cease in their functions:

1) If they are declared in bankruptcy or find themselves in insolvency proceedings; or

2) If they are condemned for any offense against property or public faith.

Said persons may never again hold such offices or functions in any bank, without the Commission's express authorization.

Article 72) — No person who has been a director or officer, or who has participated in the administration of a bank which has been compulsorily liquidated may, without the Commission's express authorization, act as director or officer or participate in the Administration of another bank.

Article 73) — The Commission shall be immediately notified of any civil or criminal action filed, because of a violation of any provision of this Cabinet Decree, committed by a bank or any other person.

Article 74) — The Commission is forbidden to conduct or order investigations concerning the private affairs of any bank's clients. The information obtained by the Commission in the exercise of its functions may not be revealed to any person or authority, except if judicially requested in accordance with the legal provisions in force or if they were consolidated data in terms of global figures. The violation of this stipulation shall be sanctioned in accordance with the provisions of Article 101 of this Cabinet Decree.

Article 101) — Any person who furnishes information in violation of this Cabinet Decree, or who violates any of the prohibitions established in it for which no specific punishment is provided for shall be subject to a fine from B/.500.00 to B/.1,000.00, imposed by the Commission, without prejudice to the applicable criminal and civil liabilities.

LAW NUMBER 18

(of January 28th, 1959)

Whereby regulations are enacted on coded bank accounts.

THE NATIONAL ASSEMBLY OF PANAMA

Decrees:

Article 1) — Banking enterprises and other credit institutions legally established in the territory of the Republic may operate coded current or deposit accounts, which shall be governed by the pertinent provisions of the Code of Commerce, as amended by the within Law.

Article 2) — The coded banking account is a contract whereby a person, whether natural or juridical maintains on deposit with a bank cash, or securities or a credit, and such bank agrees to meet the orders of payment of said depositor up to the amounts of cash delivery of securities that he may have deposited, or of the credit granted to him; and to observe strict secrecy as to the existence of the account, its balance and the identity of the depositor.

The interests which under the provisions of a bank account contract may be earned by the depositor are on integral part of the account for all legal purposes.

Article 3) — It is not necessary that the name of the drawer appear on the checks and payment orders drawn against coded current bank accounts or on orders for delivery of securities. The bank shall be required to pay such checks and orders of payment provided that the usual signature previously furnished by the committent and the number assigned to the account appear thereon.

Article 4) — Managers, officers and other employees of banking institutions, whether national or foreign, who reveal or disclose to persons alien to the institution and to the handing of these accounts any information with reference to the existence, balance or identity of the committent of a coded bank account shall be punished with imprisonment of from thirty (30) days to six (6) months, fines of from one thousand (B/.1.000.00) to ten thousand balboas (B/.10.000.00), or both.

Article 5) — The information on coded current bank accounts referred to in the preceding article may be revealed by managers and other employees of banking institutions to investigating officers, judges and magistrates who hear criminal proceedings, and who shall hold the information in strict reserve in the event that such information is no conductive to clarifying the punishable facts under investigation.

In the cases in which public functionaries, whether of a judicial or administrative category, other than those mentioned in this article, request from banking institutions any information or the attachment or embargo of coded bank accounts, including probate proceedings, the bank shall not furnish the information, nor withhold the funds or securities deposited in coded accounts, and shall reply to the request stating that it is not possible to furnish any information, even in the cases where there exist the account or the funds or securities covered by the request.

Article 6) — The managers, officers and other functionaries of banking entreprises handing coded current bank accounts shall be subject to the penalties provided for in Article 4 of the within law, even in the cases in which they disclose information on said accounts to officials or employees of the Legislative Organ, the Executive Organ, the Ministry of Finance and Treasury, the Independent Agencies of the State, the Office of the Comptroller General of the Republic, or the Judicial Organ, other than in the exceptions relative to criminal proceedings stipulated in the preceding article.

Article 7) — The provisions of Article 17 of Law 101 of 1941), as amended by Law 47 of 1954, shall not apply to coded bank accounts.

Article 8) — Banking institutions which by law are required to report to the Department of Internal Revenue of the Ministry of Finance and Treasusy on the amounts of interest paid to depositors of coded accounts, shall do so globally, that is, without specifying the amount paid to each depositor.

Article 9) — In the event of the demise of one of the persons authorized to draw against a joint account, the survivors may continue drawing against same.

Paragraph: A joint account is that against which more than one person may draw.

Article 10) — The power to withdraw funds from coded bank accounts does not cease upon the demise of the grantor of such power.

Article 11) — All provisions contrary to the within Law hereby repealed.

Article 12) — This Law shall become effective upon its publication in the Oficial Gazette.

Issued in Panama, on the twenty-sixth day of the month of January, one thousand nine hundred and fifty nine.

The President,
(Sgd.) ELIGIO CRESPO V.

The Secretary General
(Sgd.) FRANCISCO BRAVO

REPUBLIC OF PANAMA. NATIONAL EXECUTIVE ORGAN. —

Presidential Palace. Panama, January 28th, 1959. Be it Executed and Published.
(Sgd.) ERNESTO DE LA GUARDIA Jr.

The Minister of Finance and Treasury,
(Sgd.) FERNANDO ELETA A.

PANAMA

BY: Gisela Von-Muhlenbrock
Legal Specialist
Hispanic Law Division, Library of Congress

The Commercial Code of Panama[1] contains general provisions in regard to the confidentiality of accounting records, correspondence, and other commercial documents which may be disclosed only at the request of *ex officio* or a legitimately interested party. Fines are established for providing information to foreign authorities and for taking accounts books out of the country within the terms established by law. Brokers are also required to be confidential in their dealings.

The Cabinet Decree No. 238 of July 2, 1970,[2] on Reform of the Banking System and Establishment of the National Banking Commission, specifically forbids in article 74, the investigation of the private affairs of any client or bank. The information secured by the Commission in performance of its duties may be disclosed only if requested by a court of law, according to the legal provisions in force.

The Law on Numbered Bank Accounts[3] penalizes managers, officials, and employees of national and foreign banking institutions if they disclose any information in regard to the existence, balance, and identity of the principal of a numbered bank account. Information may be disclosed to Public Attorneys and Judges conducting criminal proceedings by means of a court order.

The Criminal Code[4] also penalizes the disclosure of information by those who have access to it by reason of their trade or profession.

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[1] *Gaceta Oficial*, (G.O.) June 4, 1917.

[2] Id. July 6, 1970

[3] Law No. 18 of January 28, 1959, *Id.* February 20, 1959.

[4] Law No. 6 of November 17, 1922, G.O. December 8, 1922.

SWITZERLAND

Excerpt
from
Federal Law
(Relating to Banks and Savings Banks)

Art. 47

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 francs.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.

3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

. . . .

Agreement

on the observance of care by the banks in accepting funds and on the practice of banking secrecy (ACB)

with executive regulations
of the Swiss National Bank, Zurich,
and the Swiss Bankers' Association, Basle,

of 1st July, 1982

(Translation)

Introduction

Art. 1 Preamble

- In their endeavour, by careful examination of the bank customer's identity, to prevent assets being invested in the Swiss banking system anonymously,

- in their effort to maintain Switzerland's good reputation as a financial centre and to combat economic criminality,

- with the intent of confirming, defining and laying down in a binding way the established rules of good conduct in bank management,

the signatory banks and the Swiss Bankers' Association conclude the present agreement with the Swiss National Bank.

1 The agreement is valid for all the signatory banks and their branches domiciled in Switzerland, but not their foreign branches, representative offices and subsidiary companies (but see point 13).

2 The agreement in no way changes the banks' obligation to observe banking secrecy. It cannot and is not intended to

- incorporate foreign currency, fiscal or other economic regulations into Swiss law and declare them to be applicable to the Swiss banks (unless this is already the case under existing international treaties and Swiss law);
- affect the current legal practice in the field of international law;
- change existing civil law relationship between the bank and the customer.

Swiss legislation and judicial practice as well as the treaties Switzerland has concluded with other countries continue to represent the guiding principle for the banks in Switzerland.

3 The agreement lays down in a binding way the valid rules of good conduct in bank management according to the code of professional ethics; it is not intended to impede normal banking business.

Art. 2 Forbidden acts

Acts contrary to this agreement are:

a) the opening and maintaining of accounts and deposits without having ascertained the identity of the entitled party (Art. 3–6);

b) the renting of safe-deposit boxes without having observed the necessary care (Art. 7);

c) the active aiding and abetting of capital flight, tax evasion and so forth (Art. 8 and 9).

4 The agreement is intended to ensure the careful clarification of a bank customer's identity and to permit thereby the efficient accomplishment of the bank's obligation to testify and furnish information, as provided for in federal and cantonal stipulations.

5 Acts contrary to the agreement are subject to the sanctions in Art. 13.

6 The enumeration of acts contrary to this agreement is exhaustive. The definition of such acts is solely given in the articles mentioned between brackets in Art. 2 subsections a–c. Art. 2 cannot be interpreted independently.

A Observance of care in accepting funds

Art. 3 Ascertaining of the entitled party

[1] The banks undertake not to open bank accounts or securities deposits nor to effect fiduciary investments unless they have ascertained with such care as can be reasonably expected in the circumstances the identity of the person entitled to the funds to be credited or to be invested.

[2] When opening an account or deposit as by concluding a fiduciary operation the identity of the contracting party as well as of the beneficial owner is to be established in accordance with the executive regulations (points 10–27).

[3] In the case of transactions for large amounts at bank counters, the identity of the contracting party is to be examined.

I. Scope of application

7 The obligation to check identity is valid, under reserve of point 18, for the opening of accounts, savings books and deposits of any kind whatsoever, irrespective of whether they are maintained under the name of the customer or under a number.

8 Nor are bearer savings books to be opened without the checking of identity. In the case of the savings book not being entrusted to the bank for safekeeping, the bank is not in a position and consequently not under obligation to trace the changes in the book's bearer so as to know the entitled party.

9 In the case of cash transactions at bank counters (exchange, purchase and sale of precious metals, cash subscriptions to bank issued medium-term notes and bonds, cashing cheques, etc.), the obligation to check the identity of the contracting party applies to transactions exceeding Sfr. 500,000.

II. Identification of the contracting party

A. Individuals

a) domiciled in Switzerland

10 In the case of personal appearance of the customer, the bank checks the identity of the contracting party when domiciled in Switzerland by means of an official document (passport, identity card, driving licence, etc.). Residents of Switzerland who are personally known to the bank are not required to furnish an identity document.

11 In the case of the customer relationship being initiated by correspondence, the bank checks the identity of the contracting party residing in Switzerland by obtaining confirmation as to the address of the domicile by way of postal delivery or by some other equally valid method.

b) not domiciled in Switzerland

12 In the case of personal appearance of the customer, the bank checks the identity of the contracting party having no fixed domicile or being domiciled abroad by means of an official identity document. The identity can also be ascertained by the customer's furnishing a written recommendation:

- from a foreign branch, representative office or subsidiary company of the bank,

- from a trustworthy customer personally well-known to the bank,

- from a bank listed in a recognized publication of banks (Banker's Almanac and Year Book, The Banker's World Directory, Polk's World Bank Directory).

13 The bank may accept recommendations from its foreign branches, representative offices and subsidiary companies provided it has instructed them to check the identity of persons they recommend in accordance with the present agreement.

14 Where the customer relationship is initiated by correspondence, the bank requests certification of the foreign contracting party's signature from a bank, in accordance with point 12, or from a trustworthy customer personally well-known to it. Confirmation of the address of domicile is to be obtained by postal delivery or by some other equally valid method.

B. Legal entities and companies

a) registered in Switzerland

15 The bank ascertains whether the firm name of the contracting party is published in the bulletin of the Registry of Commerce ('Schweizerisches Handelsamtblatt/Feuille officielle suisse du commerce') or listed in the Swiss Commercial Directory ('Schweizerisches Ragionenbuch/Annuaire suisse du Registre du commerce'); otherwise identity must be ascertained by means of an extract from the Commercial Register ('Handelsregister/Registre du commerce').

16 The identity of legal entities not listed in the Commercial Register (associations, foundations) is to be examined by obtaining confirmation of the address indicated by the entity by way of postal delivery or some other equally valid method.

b) registered abroad

17 Identity checking of such a contracting party is to be effected by way of an extract from a commercial register or from some other equally valid document (e.g. certificate of incorporation).

C. Exceptions applicable to customers domiciled in Switzerland

18 The identity of a contracting party domiciled or registered in Switzerland need not to be checked when the customer wishes to open

a) a salary account,

b) a savings book or savings account, a deposit book or deposit account, an investment book or investment account, designated by name and with an initial sum of less than Sfr. 50,000,

c) an account for paying in share capital at a cantonal consignment office with a view to founding or increasing the capital of a joint stock company.

The exception under point a) is also valid for staff resident abroad of an employer domiciled or registered in Switzerland, provided the latter requests the opening of accounts for his employees collectively.

III. Ascertaining the identity of the beneficial owner

19 The identity of the beneficial owner of the assets to be deposited is to be ascertained at the time of opening the account or deposit.

20 All care which can be reasonably expected under the circumstances must be exercised in identifying the beneficial owner. The bank may assume that the contracting party and the beneficial owner are identical. This can no longer be assumed, however, if unusual observations are made (see points 23 and 28–32).

A. Individuals

21 If the contracting party declares himself to be acting on behalf of a third party, the bank has to obtain the third party's full name, domicile and country of domicile.

B. Legal entities and companies

22 If the contracting party acts for the account of a legal entity or company, the bank registers the firm name, the domicile and country of domicile.

IV. Cases of doubt

23 If any doubts arise, the procedure according to Art. 4 is to be followed, particularly when the details as to identity appear to be doubtful or when there are indications which give doubt as to the contracting party's being identical with the beneficial owner (see points 28–32).

24 Reserve is made for the special stipulations as to domiciliary companies and persons sworn to professional secrecy (Art. 5 and 6, points 33–39 and 40–47).

V. Surveillance

25 The bank has to ensure that its internal control department and the auditing firm required by the Federal Law on Banks and Savings Banks can check as to the identification procedure being carried out.

26 Appropriate record is to be kept of the name, christian name, address and country of domicile of the contracting party as well as of the means used to establish identitiy. Any documents obtained in the case of legal entities are to be preserved.

27 The details specified in points 21 and 22 as to the identity of the beneficial owner or of the individuals controlling a domiciliary company must be available.

Art. 4 Procedure in cases of doubt

[1] In cases of doubt, when opening accounts or deposits, the banks require a written declaration from the customer as to whether he is acting for his own account or for account of a third party and in the latter case, for whose account.

[2] For this purpose the banks use form A, which is an integral part of this agreement.

28 In the case of doubts arising as to whether the contracting party is identical with the beneficial owner, form A 'Declaration on opening an account or deposit' is to be presented for signature.

29 For example, doubt is justified in the following cases:

a) The opening of an account or deposit is requested by a person domiciled in Switzerland. At the same time a power of attorney is given to a person not recognizable as being closely enough related to the account holder (e.g. to a foreigner), or if any other unusual aspects arise.

b) The opening of an account or a deposit is requested by a person domiciled in Switzerland whose financial situation is known to the bank. The assets handed over or to be remitted are beyond the limits of the customer's financial situation.

c) The opening of an account or a deposit is requested by a person domiciled abroad, who has been introduced to the bank (see points 12 and 13). At the same time a power of attorney is given to a person who is not recognizable as being in a sufficiently close relationship to the account holder.

d) The opening of an account or a deposit is requested by a person domiciled abroad, who has been introduced to the bank (see points 12 and 13) and whose financial situation is known to the bank. The assets handed over or to be remitted are beyond his financial situation.

e) The opening of an account or a deposit is requested by a person domiciled abroad who has not been recommended to the bank. The discussion the bank must have with the customer at the time of opening the account or deposit brings to light unusual aspects.

f) The opening of an account or a deposit is requested by a person domiciled abroad by way of correspondence, accompanied by an attestation of the signature (see point 14), but who is not personally known to the bank.

30 Where serious doubt remains as to the accuracy of the customer's written declaration, which cannot be eliminated by further clarification, the bank declines the request for the opening of the account or deposit.

31 Form A, which is to be utilized in accordance with Art. 4, para. 2, is annexed to this agreement and can be obtained from the Swiss Bankers' Association in Basle. It is available in German, French, Italian and English.

32 The banks are at liberty to produce their own forms, adapted for their own particular needs. However, such forms must contain the full text of the sample form and in particular, the indication as to the importance of banking secrecy and the bank's obligation to furnish information is not to be given in smaller or weaker print than the rest of the text.

Art. 5 Procedure in the case of domiciliary companies

[1] The following documents are to be requested from domestic and foreign domiciliary companies:

a) an extract from the Commercial Register or a similarly valid credential,

b) the declaration of the competent organ on form A as to the controlling individuals.

[2] Considered as domiciliary companies within the meaning of this agreement are all companies, establishments, foundations, trusts etc., which do not exercise activity in Switzerland by trading, manufacturing or in any other form of commercially managed business.

[3] The utilization of form A can be waived where the affiliation of a domiciliary company to a group or where the controlling interests and the identity of the controlling individuals are known to the bank.

I. Domiciliary company

33 Domestic and foreign enterprises are considered as domiciliary companies, irrespective of their purpose, function and registered office, when

a) no business premises of their own exist (domiciled with a solicitor, with a fiduciary company, with a bank, etc.) or

b) no staff of their own, employed exclusively by them or when such own staff is employed solely in administrative work (bookkeeping, correspondence on instructions from the persons or companies controlling the domiciliary company).

34 Domestic companies with an operation of their own, where the Board of Directors and Management are identical (e.g. companies managed by a sole person), are not considered as domiciliary companies within the meaning of this agreement.

II. Controlling interests

35 A company is controlled by that person or group of persons who disposes directly or indirectly of more than half of the company's capital or the voting rights or who exercises decisive influence on it in some other recognizable way.

36 **In the case of companies which are controlled by legal entities, the bank must ascertain the identity of the individuals controlling the legal entity by having form A completed by the contracting party. Point 30 is applicable.**

37 In cases where, in accordance with Art. 5, para. 3, form A need not be to presented, points 21, 22, 25 and 26 are to be applied accordingly.

III. Ascertaining the identity of the controlling individuals

38 The identity of individuals controlling domiciliary companies is to be ascertained and recorded in accordance with point 21.

39 Where changes in the authorized signatures for domiciliary companies occur in business with the bank, the latter has to repeat the procedure laid down in Art. 5, para. 1. Where clarification as to the controlling individuals is not obtainable, Art. 11 is applicable.

Art. 6 Persons bound by professional secrecy

¹ Where a customer acts through a person domiciled or with registered office in Switzerland, who is bound by a legally protected professional secrecy, or who is a member of an association affiliated to the 'Schweizerische Treuhand- und Revisionskammer/Chambre suisse des Sociétés fiduciaires et des Experts-comptables', the bank must obtain from such a person on form B a written declaration to the effect that the beneficial owner is known to him and that no forbidden transaction within the meaning of this agreement is being concluded.

² A written declaration is waived in the case of accounts and deposits of domestic and foreign banks.

I. Privileged professions

40 Particularly lawyers and notaries are bound in Switzerland by professional secrecy which is protected by law (Art. 321, point 1 of the Swiss Criminal Code).

41 Analogously treated are trustees and portfolio managers who are members of an association affiliated to the 'Schweizerische Treuhand- und Revisionskammer/Chambre suisse des Sociétés fiduciaires et des Experts-comptables'.

42 The Swiss Bankers' Association places at the banks' disposal periodically lists of these members. The banks must check as to whether the trustee or portfolio manager is a member.

43 In the case of lawyers, notaries, trustees and portfolio managers with domicile or registered office abroad form A is to be used with a view to ascertaining the beneficial owner.

II. Signing the declaration

44 Form B, which is to be utilized in accordance with Art. 6, para. 1, constitutes an integral part of the agreement and can be obtained from the Swiss Bankers' Association in Basle. It is available in German, French, Italian and English.

Any form produced by the banks for their special needs must contain the full text of the sample form (see Annex) and must not show the confirmation of the person bound by professional secrecy in smaller or weaker print than the rest of the text.

45 Where the party bound by professional secrecy is a legal entity or a company, form B is to be signed in the name of the entity or company.

46 The party bound by professional secrecy in accordance with Art. 6, para. 1 can avail himself of the exception ruling irrespective of whether he is acting in the capacity of mandatary or as organ of a legal entity or company.

Where the party bound by professional secrecy is an employee or member of a managing organ of a bank, he cannot avail himself of the exception ruling under Art. 6, para. 1 vis-à-vis the bank, but has to confirm in each case on form A on whose behalf he is acting; in the case of domiciliary companies, he has also to indicate the controlling individuals.

III. Exception for banks

47 No declaration is to be remitted for accounts and deposits belonging to banks. Domestic banks are those subject to the Federal Law on Banks and Savings Banks of 8th November, 1934/11th March, 1971. Institutions whose registered office is abroad are to be considered as banks if they qualify as such under the laws of their country of domicile.

IV. Identification of the person bound by professional secrecy

48 The identity of persons who claim to be bound by professional secrecy is to be ascertained in accordance with points 10–18; points 25 and 26 are to be applied accordingly.

B Observance of care in renting safe-deposit boxes

Art. 7 Identity checking and trustworthiness

[1] When a safe-deposit box is rented, the identity of the renter is to be ascertained. The procedure is in accordance with points 10–18.

[2] The banks undertake to rent safe-deposit boxes only to persons whose trustworthiness gives no cause for doubt after having observed all care which can be reasonably expected under the circumstances.

49 Art. 7 is applicable to persons and companies in Switzerland and abroad.

50 The trustworthiness of the renter can be considered as proved, e.g. when:

a) he already maintains a business relationship with the bank;

b) he is known personally to an employee or a member of a managing organ of the bank;

c) he is introduced by a customer or another bank;

d) no firm indication exists of the safe-deposit box being rented for illegal purposes.

C Prohibition of actively aiding and abetting capital flight, tax evasion and similar acts

Art. 8 Capital flight

^{1} The banks undertake not to actively assist in the transfer of capital from countries whose legislation restricts the investment of funds abroad.

^{2} The following are considered as active assistance:

a) arrangements to receive customers abroad outside the offices of the bank with a view to accepting funds;

b) participation in the organisation of compensation transactions abroad when it is known to the bank or when it should know from the circumstances in general that the compensation serves the purpose of capital flight;

c) active cooperation with persons and companies organizing capital flight or giving assistance for such, by

- **remitting orders,**
- **promising commission,**
- **maintaining their accounts, when such persons and companies are domiciled or have registered office in Switzerland and when it is known to the bank that they use their accounts professionally for the purpose of assisting capital flight;**

d) referring customers to the persons and companies indicated under c).

51 Capital flight is a not authorized transfer of capital in the form of foreign currency, banknotes or securities from a country prohibiting or restricting such transfers abroad by its residents.

52 Art. 8 is not applicable to transfers of capital from Switzerland abroad.

53 Visiting customers abroad is permitted provided the bank's representative neither accepts funds, the transfer of which is forbidden, nor gives advice as to the illegal transfer of capital nor participates in compensation transactions.

54 Otherwise, assets may be accepted from foreign customers in Switzerland.

Art. 9 Tax evasion and similar acts

The banks do not support attempts of their customers to deceive authorities in Switzerland or abroad, in particular tax authorities, either by way of incomplete or in any other way misleading attestations.

55 It is forbidden to remit incomplete or in any other way misleading attestations to customers themselves or on their request directly to authorities in Switzerland or abroad.

Particularly the following are considered as authorities: tax authorities, custom offices, monetary and bank supervisory authorities.

56 The prohibition covers primarily special attestations to authorities at the customer's request.

The bank is not permitted to alter routine advices such as account and deposit statements, credit and debit advices, settlement notes for foreign exchange transactions, coupon and stock exchange transactions for the purpose of deception.

57 Attestations are incomplete when relevant facts are omitted with a view to deceiving authorities, such as the bank's omitting on the customer's request certain items from a special confirmation or from a statement of account or deposit.

It is not necessary to indicate on statements of account or deposit that other accounts or deposits are maintained for the same customer.

58 Attestations are misleading when, with a view to deceiving authorities, facts are presented contrary to the truth, e.g. by

a) false dating, false amounts, fictive rates or by establishing credit or debit advices bearing false indications about the titulary of the account;

b) attestation as to fictive claims or debts (irrespective of whether the attestation corresponds to the ledgers of the bank or not).

D Other provisions

Art. 10 Numbered accounts and numbered deposits

The prescriptions of the present agreement apply without restriction to accounts and deposits maintained under numbers or passwords.

59 Confirmations as to the total business relationship with a customer are to include accounts and deposits maintained under numbers or passwords, also fiduciary accounts and deposits.

Art. 11 Dissolution of business relations

The banks undertake to break off a relationship with a customer when in the course of business with him suspicion arises as to the details on the beneficial owner of the funds credited or invested or on the renter of a safe-deposit box being inexact.

60 The current relationship is to be terminated as quickly as is possible without violating the contract with the customer, if the bank discovers that the customer on opening the account or deposit intentionally made false statements as to the beneficial owner.

61 If the bank is prevented from reaching the customer owing to mailing instructions, it can postpone, in the case of point 60, the dissolution of the relationship to the next visit of the customer or to the next occasion of mailing correspondence.

Art. 12 Control by the auditing firms

^{1} In signing this agreement the banks instruct and authorize their auditing firms required by the Federal Law on Banks and Savings Banks to check as to the observance of the agreement at the time of their regular auditing by way of random tests and to report offences or justified suspicion of offences to the Arbitration Committee as laid down in Art. 13, as well as to the Federal Banking Commission.

^{2} The National Bank will make known to the authorized auditing firms the text of this agreement as well as a list of the signatories and thus their mandate.

Art. 13 Arbitration Committee, sanctions

^{1} An Arbitration Committee is set up, with seat in Berne, for the enquiry and punishment of violations to this agreement. The National Bank and the Swiss Bankers' Association delegate two members each to the Arbitration Committee which is chaired by a federal judge, nominated unanimously by the members. The Committee nominates a secretary.

^{2} The National Bank and the Swiss Bankers' Association designate jointly a person entrusted with the investigation. This investigator proposes to the Arbitration Committee either to open proceedings and to impose a conventional fine or to suspend the enquiry. When requesting information from a bank, he informs the latter of the capacity in which it is being implicated in the investigation.

^{3} The Arbitration Committee can sentence a bank convicted of an offence against the agreement to a conventional fine of up to ten million Swiss francs. In fixing the conventional fine due regard is to be paid to the gravity of the breach of the agreement, the degree of the bank's fault and its financial situation. The Arbitration Committee donates the conventional fine to a charitable institution.

[4] The Arbitration Committee arranges the procedure; Art. 36–65 of the Federal Law of 4th December, 1947 on the Federal Rules of Civil Procedure and Art. 22–28 of the Federal Law of 16th December, 1943 on the Organisation of the Federal Administration of Justice are to be applied accordingly.

[5] As mandataries of the bank in the sense of Art. 47, para. 1 of the Federal Banking Law, the members of the Arbitration Committee, the secretary as well as the person charged with the investigation are to observe strict secrecy as to the facts which become known to them in the course of the proceedings. In signing the agreement the banks waive the possibility of invoking banking secrecy as regards their customers vis-à-vis the Arbitration Committee or the person entrusted with the investigation.

[6] The Arbitration Committee informs the Federal Banking Commission of its decisions to enable them to examine the question as to whether the persons entrusted with the administration and management of the bank concerned still give 'warranty for an irreproachable conduct of business' in the sense of Art. 3, para. 2, lit. c of the Banking Law.

62 The representatives of the Swiss National Bank in the Arbitration Committee must be members of the Governing Board or their deputies, those of the Swiss Bankers' Association members of the Board of Directors or the Management.

63 Periodically the Arbitration Committee gives the banks an insight into its jurisprudence under due observance of banking and business secrecy.

Art. 14 Entry into force

[1] This agreement enters into force on 1st October, 1982 and is valid for a fixed period of five years.

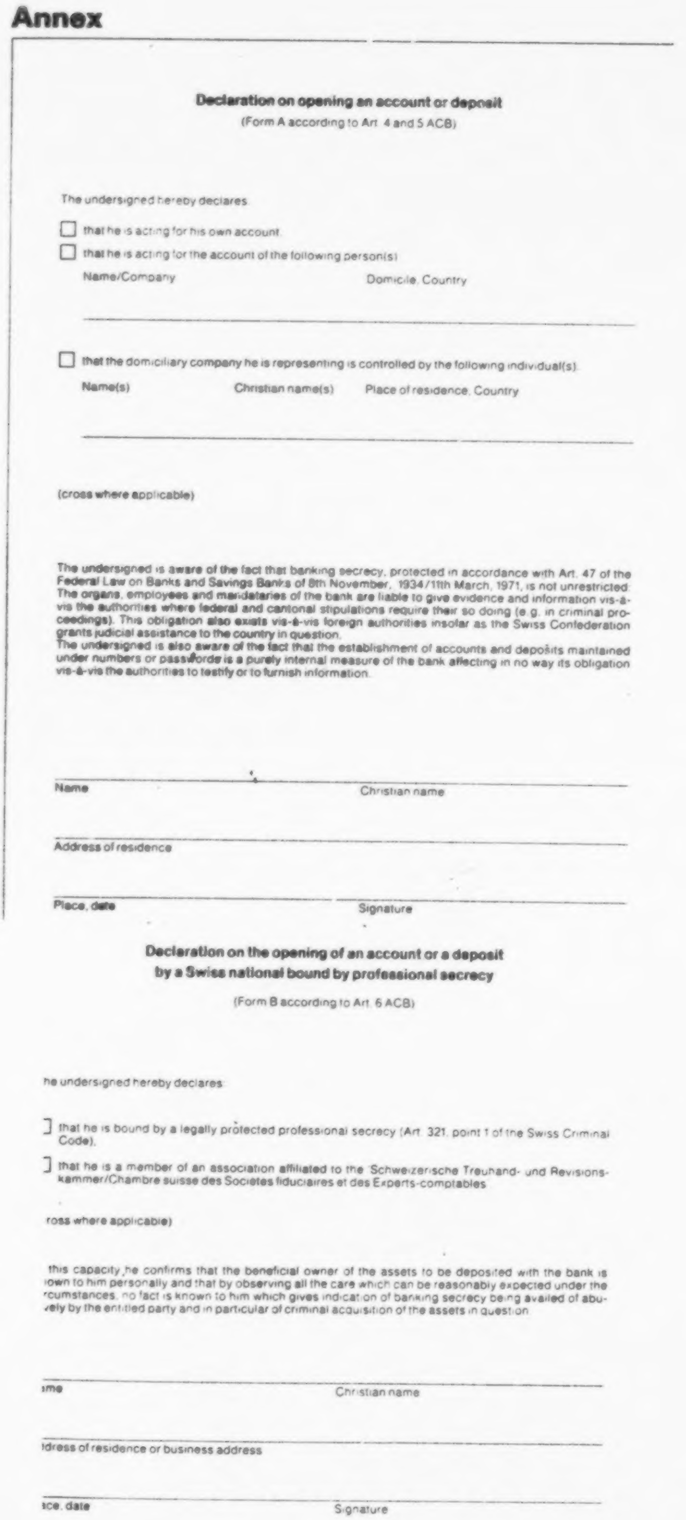
[2] Subsequently it is valid for further periods of one year unless denounced by the Swiss Bankers' Association or the National Bank under observance of three months' notice.

[3] Each signatory bank has the right to denounce the agreement under observance of three months' notice as per the end of the contract year, for the first time as per 30th September, 1987.

[4] The signatory banks authorize the Board of Directors of the Swiss Bankers' Association, in cooperation with the National Bank, to make any modifications and definitions to the agreement which may prove necessary in the light of experience gained.

64 The authorization in Art. 14, para. 4 does not include the competence of the Swiss Bankers' Association to alter the substance of the agreement to the disadvantage of the signatory banks.

65 Neither the Swiss Bankers' Association nor the National Bank is to give an authentic interpretation of the agreement. The Swiss National Bank and the Swiss Bankers' Association are jointly competent for the interpretation.



Annex

Declaration on opening an account or deposit

(Form A according to Art. 4 and 5 ACB)

The undersigned hereby declares

☐ that he is acting for his own account.

☐ that he is acting for the account of the following person(s)

Name/Company Domicile, Country

☐ that the domiciliary company he is representing is controlled by the following individual(s).

Name(s) Christian name(s) Place of residence, Country

(cross where applicable)

The undersigned is aware of the fact that banking secrecy, protected in accordance with Art. 47 of the Federal Law on Banks and Savings Banks of 8th November, 1934/11th March, 1971, is not unrestricted. The organs, employees and mandataries of the bank are liable to give evidence and information vis-à-vis the authorities where federal and cantonal stipulations require their so doing (e.g. in criminal proceedings). This obligation also exists vis-à-vis foreign authorities insofar as the Swiss Confederation grants judicial assistance to the country in question.
The undersigned is also aware of the fact that the establishment of accounts and deposits maintained under numbers or passwords is a purely internal measure of the bank affecting in no way its obligation vis-à-vis the authorities to testify or to furnish information.

Name Christian name

Address of residence

Place, date Signature

Declaration on the opening of an account or a deposit by a Swiss national bound by professional secrecy

(Form B according to Art. 6 ACB)

he undersigned hereby declares:

] that he is bound by a legally protected professional secrecy (Art. 321, point 1 of the Swiss Criminal Code).

] that he is a member of an association affiliated to the 'Schweizerische Treuhand- und Revisionskammer/Chambre suisse des Societes fiduciaires et des Experts-comptables'

ross where applicable)

this capacity he confirms that the beneficial owner of the assets to be deposited with the bank is iown to him personally and that by observing all the care which can be reasonably expected under the rcumstances, no fact is known to him which gives indication of banking secrecy being availed of abuvely by the entitled party and in particular of criminal acquisition of the assets in question

ime Christian name

idress of residence or business address

ice, date Signature

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STATUTES

OF THE

REPUBLIC OF SOUTH AFRICA

CLASSIFIED AND ANNOTATED FROM 1910

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1981

PROTECTION OF BUSINESSES ACT
NO. 99 OF 1978

[ASSENTED TO 20 JUNE, 1978] [DATE OF COMMENCEMENT: 4 AUGUST, 1978]

(*English text signed by the State President*)

as amended by

Protection of Businesses Amendment Act, No. 114 of 1979

ACT

To restrict the enforcement in the Republic of certain foreign judgments, orders, directions, arbitration awards and letters of request; to prohibit the furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request; and to provide for matters connected therewith.

1. **Prohibition of enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request and furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request.**—(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs—

(*a*) no judgment, order, direction, arbitration award or letters of request delivered, given or issued or emanating from outside the Republic and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic;

(*b*) no person shall in compliance with any order, direction or letters of request issued or emanating from outside the Republic, furnish any information as to any business whether carried on in or outside the Republic.

(2) The permission contemplated in subsection (1) (*b*) may—

(*a*) be granted either by notice in the *Gazette* or by written authority addressed to a particular person;

(*b*) be granted subject to such conditions as the said Minister may deem fit;

(*c*) relate only to specified goods or businesses or classes of goods or businesses, or to orders, directions or letters of request issued in or emanating from a specified country;

(*d*) if it is granted by notice in the *Gazette*, relate only to specified persons or classes of persons.

(3) In the application of subsection (1) (*a*) an act or transaction shall be any act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.

[Sub-s. (3) substituted by s. 1 of Act No. 114 of 1979.]

2. **Offences and penalties.**—Any person who contravenes the provisions of section 1 (1) (*b*) shall be guilty of an offence and on conviction liable to a fine not exceeding two thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

3. **Repeal of section 2 of Act 94 of 1974.**—Section 2 of the Second General Law Amendment Act, 1974, is hereby repealed.

4. **Short title and commencement.**—This Act shall be called the Protection of Businesses Act, 1978, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

UNITED KINGDOM

The Protection of Trading Interests Act, 1980,[1] was enacted to provide protection to United Kingdom companies and persons against what were seen as attempts by other countries to impose their domestic laws and regulations outside of their own territories. The British government objected to the powers of the United States administrative agencies which were pursuing enquiries and launching proceedings against "persons, who according to [the British] view of international law, are outside the jurisdiction of the United States."[2] The particular agencies that the British government was objecting to were the Federal Trade Commission, the Securities and Exchange Commission and the Federal Maritime Commission which imposed extensive disclosure requirements on foreign corporations. An earlier statute, the Shipping and Commercial Documents Act, 1964,[3] was enacted to restrict the furnishing of evidence to the Federal Maritime Commission concerning ocean shipping conferences.

The provision against disclosure of information is contained in section 2 of the Act. The section authorizes the Secretary of State to give directions prohibiting compliance with a request for commercial information if:

(a) it infringes upon the jurisdiction or is prejudicial to the sovereignty of the United Kingdom, or

(b) compliance with it would be prejudicial to the security of the United Kingdom or impair its relations with another government.

1/ ch. 11. A copy is enclosed.

2/ 973 Parl. Deb., H.C. (5th ser.) 1537 (1979).

3/ ch. 87, repealed by the present Act.

A request for information is also inadmissible if it is not made in connection with civil or criminal proceedings which have already been commenced or the requesting party is on a "fishing expedition," i.e. a wider discovery procedure than is allowed under English law. These grounds are similar to those under which a United Kingdom court would refuse a request by a foreign court for evidence under the Evidence (Proceedings in Other Jurisdictions) Act, 1975.4/

Unlike other provisions in the Act which require that a formal order by the Secretary of State in the form of a statutory instrument be placed before Parliament, orders under section 2 are informal and are not published. To our knowledge, only one such order - concerning an investigation by the United States Commodities and Futures Trading Corporation, has been issued.

Finally, under section 8(8) the application of the Act may be extended by order to any British dependent territory. No such orders have been issued so far.5/

Prepared by Kersi B. Shroff
Senior Legal Specialist
American-British Law Division
Law Library, Library of Congress
February 1983

4/ ch. 34. The leading case on the issue of sovereignty is the decision of the Rio-Tinto Zinc Corporation v. Westinghouse Electric Corporation, 1978 A.C. 547.

5/ Relevant sections from the following published articles are enclosed: M. Danaher, "Anti-Antitrust Law: The Clawback and other features of the United Kingdom Protection of Trading Interests Act, 1980," 12 Law and Policy in International Business 947-956 (1980). A Huntley, "The Protection of Trading Interests Act 1980 - some jurisdictional aspects of enforcement of antitrust laws," 30 International and Comparative Law Quarterly 213-214, 221-223 (1981).

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1980

ACTION—LITERARY AND SCIENTIFIC INSTITUTIONS

LONDON
BUTTERWORTHS
1981

CONFLICT OF LAWS

(For earlier statutes within the scope of this title, see Vol. 6, p. 331; Vol. 41, p. 217; Vol. 43, p. 231.)

Page
Protection of Trading Interests Act 1980 258

No other statute within the scope of this title was passed during 1980.

THE PROTECTION OF TRADING INTERESTS ACT 1980

(1980 c. 11)

PRELIMINARY NOTE

This Act, which came into force on receiving the Royal Assent on 20th March 1980, provides protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries and their effect would be to damage the trading interests of the United Kingdom, or would be otherwise prejudicial to the sovereignty or security of the United Kingdom. The Act also provides for the non-enforcement of certain foreign judgments and enables recovery to be made of foreign awards of multiple damages. The Act repeals the Shipping Contracts and Commercial Documents Act 1964, Vol. 31, p. 675 (s. 8 (5), *post*).

S. 1, *post*, provides a number of means by which the Secretary of State for Trade may counter measures which are taken or proposed to be taken by or under the law of overseas countries for regulating or controlling international trade, and which are or would be damaging to the trading interests of the United Kingdom. First, he may make orders specifying the measures concerned. Second, he may make further orders requiring persons in the United Kingdom who carry on business there to notify him of any requirements or prohibitions imposed or threatened to be imposed on them under such measures. Third, he may prohibit compliance with such measures. International trade is widely defined to include any business activity.

S. 2, *post*, provides that where a person in the United Kingdom has been or may be required to produce to a court, tribunal or authority of an overseas country commercial documents outside that country or to furnish commercial information the Secretary of State may give directions prohibiting compliance with that requirement. The section specifies the circumstances in which a direction may be given, which are broadly comparable to the circumstances in which a United Kingdom court would refuse a request made by an overseas court for evidence under the Evidence (Proceedings in Other Jurisdictions) Act 1975, Vol. 45, p. 482.

S. 3, *post*, provides penalties for failure to comply with requirements imposed under ss. 1 and 2, *post*. It provides for a maximum fine of £1,000 on summary conviction and for an unlimited fine on conviction on indictment.

S. 4, *post*, provides that in proceedings under the Evidence (Proceedings in Other Jurisdictions) Act 1975, Vol. 45, p. 482, United Kingdom courts shall not comply with a request made by a court of an overseas country when the Secretary of State has given a certificate that the request infringes United Kingdom jurisdiction or is otherwise prejudicial to United Kingdom sovereignty.

S. 5, *post*, provides that the following judgments given by courts of overseas countries shall not be enforceable in the United Kingdom: (i) judgments for multiple damages within the meaning of s. 5 (3); (ii) judgments based on competition laws which have been specified by an order made by the Secretary of State: and (iii) judgments on claims for contributions in respect of damages awarded by a judgment falling within (i) or (ii) above.

S. 6, *post*, enables United Kingdom citizens, United Kingdom corporations and other persons carrying on business in the United Kingdom to recover sums paid under foreign judgments for multiple damages in excess of the compensation for the loss of the person in whose favour the judgment was given. It also permits courts in the United Kingdom to entertain such proceedings even if the defendant to them is not within the United Kingdom.

S. 7, *post*, enables Orders in Council to be made providing for the enforcement in the United Kingdom of judgments given under laws of overseas countries corresponding to s. 6, *post*.

ARRANGEMENT OF SECTIONS

Section — Page
1. Overseas measures affecting United Kingdom trading interests 259
2. Documents and information required by overseas courts and authorities 260
3. Offences under ss. 1 and 2 261
4. Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975 263
5. Restriction on enforcement of certain overseas judgments 264
6. Recovery of awards of multiple damages 265
7. Enforcement of overseas judgment under provision corresponding to s. 6 266
8. Short title, interpretation, repeals and extent 267

An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom **[20th March 1980]**

Northern Ireland. This Act applies; see s. 8 (7), *post*.

1. Overseas measures affecting United Kingdom trading interests

(1) If it appears to the Secretary of State—

(*a*) that measures have been or are proposed to be taken by or under the law of any overseas country for regulating or controlling international trade; and

(*b*) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Directions under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

NOTES

Sub-s. (1): Appears. For a discussion as to the effect of the use of this and similar expressions such as "in the opinion" and "satisfied", on the power of the courts to review administrative action, see 1 Halsbury's Laws (4th Edn.), para 22.

Secretary of State. *I.e.*, one of Her Majesty's Principal Secretaries of State; see the Interpretation Act 1978, s. 5, Sch. 1, Vol. 48, pp. 1299, 1322.

Persons. The expression "person" includes a body of persons corporate or unincorporate; see the Interpretation Act 1978, s. 5, Sch. 1, Vol. 48, pp. 1299, 1320.

Carrying on business. The words "carry on business" denote something of a permanent character, not merely an isolated transaction and a business is carried on only where there is some degree of management or control; see *Brown* v. *London North Western Rail. Co* (1863), 32 L.J.Q.B. 318; [1861–73] All E.R. Rep. 487; *Graham* v. *Lewis* (1888), 22 Q.B.D. 1, C.A.; and *Cain* v. *Butler*, [1916] 1 K.B. 759, at p. 762; but contrast *Cornelius* v. *Phillips*, [1918] A.C. 199; [1916–17] All E.R. Rep. 685, H.L. See also *Kirkwood* v. *Gadd*, [1910] A.C. 422, at p. 423; [1908–10] All E.R. Rep. 768, H.L., at p. 771; *Newman* v. *Oughton*, [1911] 1 K.B. 792; *Transport and General Crédit Corporation, Ltd.* v. *Morgan*, [1939] Ch. 531; [1939] 2 All E.R. 17; and *Re Brauch (a debtor), Ex parte Britannic Securities and Investments, Ltd.*, [1978] 1 All E.R. 1004, C.A. See also the note "Business" to s. 2, *post*.

United Kingdom. *I.e.*, Great Britain and Northern Ireland; see the Interpretation Act 1978, s. 5, Sch. 1, Vol. 48, pp. 1229, 1322. "Great Britain" means England, Scotland and Wales by virtue of the Union with Scotland Act 1706, preamble, Art. 1, Vol. 6, p. 502, as read with the Interpretation Act 1978, s. 22 (1), Sch. 2, para. 5 (*a*), Vol. 48, pp. 1309, 1325. Neither the Channel Islands nor the Isle of Man is within the United Kingdom, but note, as to the possible extension of this Act thereto, s. 8 (8), *post*.

Sub-s. (2): Carries on business. See the note "Carrying on business" to sub-s. (1) above.

Sub-s. (4): Statutory instrument; subject to annulment. For provisions as to statutory instruments generally, see the Statutory Instruments Act 1946, Vol. 32, p. 668, and as to statutory instruments which are subject to annulment, see ss. 5 (1) and 7 (1) of that Act, Vol. 32, pp. 672, 673.

Sub-s (6): In the course of a business. Something is done "in the course of" a business if it is done as part of its activities; cf. *Charles R. Davidson & Co.* v. *M'Robb (or Officer)*, [1918] A.C. 304, at p. 321, *per* Lord Dunedin. See also *London Borough of Havering* v. *Stevenson*, [1970] 3 All E.R. 609, and *Wycombe Marsh Garages, Ltd.* v. *Fowler*, [1972] 3 All E.R. 248. On the meaning of "business", see the note to s. 2, *post*.

Offences. For offences in connection with sub-ss. (2) and (3) above, see s. 3, *post*.

Definitions. For "overseas country", see s. 8 (2), *post*; as to "law of an overseas country", see s. 8 (3), *post*. Note as to "trade" and "trading interests", sub-s. (6) above.

Order under this section. At the time of going to press no order had been made under sub-s. (1) or (2) of this section but *quaere* whether by virtue of the Interpretation Act 1978, s. 17 (2) (*b*), Vol. 48, p. 1306, the Shipping Contracts (Foreign Measures) Order 1968, S.I. 1968 No. 1382, has effect under sub-s. (1) above. That order was made under the Shipping Contracts and Commercial Documents Act 1964, s. 1 (1), Vol. 31, p. 675 (repealed by s. 8 (5), *post*), and relates to an order of the Federal Maritime Commission of the United States of America directed to the North Atlantic Westbound Freight Association and its member lines.

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2. Documents and information required by overseas courts and authorities

(1) If it appears to the Secretary of State—

(*a*) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or

(*b*) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1) (*a*) or (*b*) above is inadmissible—

(*a*) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or

(*b*) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1) (*a*) above is also inadmissible—

(*a*) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or

(*b*) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and

(*a*) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or

(*b*) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement,

shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

NOTES

Sub-s. (1): Appears; Secretary of State; United Kingdom. See the notes to s. 1, *ante*.

Person. See the note "Persons" to s. 1, *ante*.

Sub-s. (6): Business. It has been said that "the word 'business' . . . means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business" (*Rolls* v. *Miller* (1884), 27 Ch.D. 71, C.A., *per* Lindley, L.J., at p. 88) and it has also been said that neither the making of a profit nor any commercial activity is essential (*Real-Brook, Ltd.* v. *Minister of Housing and Local Government*, [1967] 2 Q.B. 65; [1967] 1 All E.R. 262). In other cases, however, it has been pointed out that there is a difference between "business" in this very broad sense and "business" meaning a regularly conducted commercial enterprise; see *Inland Revenue Comrs.* v. *Marine Steam Turbine Co., Ltd.*, [1920] 1 K.B. 193, at pp. 202—204; *Re A Debtor (No. 3 of 1926)*, [1927] 1 Ch. 97, at p. 106; [1926] All E.R. Rep. 337, C.A., at p. 341; *Lord Advocate* v. *Glasgow Corpn.*, 1958 S.L.T. 2, at p. 8; *Abernethie* v. *A.M. & J. Kleiman, Ltd.*, [1970] 1 Q.B. 10; [1969] 2 All E.R. 790, C.A.; and *Customs and Excise Commissioners* v. *Royal Exchange Theatre Trust* [1979] 3 All E.R. 797. It is thought that here the word has the narrower meaning of a regularly conducted commercial enterprise.

It has been held that a single transaction can be a "business" for the purposes of the Partnership Act 1890, s. 45, Vol. 24, p. 524 (*Re Abenheim, Ex parte Abenheim* (1913), 109 L.T. 219). For other purposes, however, a distinction is drawn between isolated transactions and the carrying on of a business; see *Re Griffin, Ex parte Board of Trade* (1890), 60 L.J.Q.B. 235, at p. 237; *Linstead* v. *Simpson*, 1972 S.C. (J.) 101, at pp. 104, 105; and cf. *Cornelius* v. *Phillips*, [1918] A.C. 199; [1916-17] All E.R. Rep. 685. Again, it is thought that the narrower view may well be preferable for the purpose of this Act.

It is clear that a business does not cease to be merely because it makes a loss (*Re Ogilby, Ogilby* v. *Wentworth-Stanley*, [1942] Ch. 288), and even activities intended permanently to be carried on at a loss have been held to be a business (*Rolls* v. *Miller*, *supra*; *South-West Suburban Water Co.* v. *St. Marylebone Guardians*, [1904] 2 K.B. 174, at p. 180).

The expression "business" is clearly wide enough to include a profession; see *Re Williams' Will Trusts, Chartered Bank of India, Australia and China* v. *Williams*, [1953] Ch. 138; [1953] 1 All E.R. 536, and *R.* v. *Breeze*, [1973] 2 All E.R. 1141, C.A.; and contrast *Stuchbery* v. *General Accident, Fire and Life Assurance Corpn., Ltd.*, [1949] 2 K.B. 256; [1949] 1 All E.R. 1026, C.A.

On the meaning of "business" generally, see 38 Halsbury's Laws (3rd Edn.), pp. 10, 11, and 1 Words and Phrases (2nd Edn.), pp. 199 *et seq.*

Offence. For the offence of knowingly contravening any direction given under sub-s. (1) above, see s. 3, *post*.

Definitions. For "overseas country", see s. 8 (2), *post*; as to "court, tribunal or authority of an overseas country", see s. 8 (3), *post*. Note as to "imposition of a requirement", sub-s. (5) above, and as to "commercial document", "commercial information" and "document", see sub-s. (6) above.

3. Offences under ss. 1 and 2

(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2 (1) above shall be guilty of an offence and liable—

(*a*) on conviction on indictment, to a fine;

(*b*) on summary conviction, to a fine not exceeding the statutory maximum.

(2) A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom shall not be guilty of an offence under subsection (1) above by reason of anything done or omitted outside the United Kingdom in contravention of directions under section 1 (3) or 2 (1) above.

(3) No proceedings for an offence under subsection (1) above shall be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

(5) In subsection (1) above "the statutory maximum" means–

(*a*) in England and Wales and Northern Ireland, the prescribed sum within the meaning of [section 32 of the Magistrates' Courts Act 1980] (at the passing of this Act £1,000);

(*b*) (*applies to Scotland*);

and for the purposes of the application of this subsection in Northern Ireland the provisions of [the said Act of 1980] relating to the sum mentioned in paragraph (*a*) shall extend to Northern Ireland.

NOTES

The words in square brackets in sub-s. (5) were substituted by the Magistrates' Courts Act 1980, s. 154 (1), Sch. 7, para. 205.

Sub-s. (1): Person. See the note "Persons" to s. 1, *ante*.

Reasonable excuse. What is a reasonable excuse is largely a question of fact; cf. *Lock* v. *Epsom Rural District Council*, [1922] 1 K.B. 383; [1922] All E.R. Rep. 784. Yet it is clear that ignorance of the statutory provisions provides no reasonable excuse (cf. *Aldridge* v. *Warwickshire Coal Co., Ltd.* (1925), 133 L.T. 439, C.A.), nor does a mistaken view of the effect of those provisions (*R.* v. *Reid (Philip)*, [1973] 3 All E.R. 1020, C.A.). (*Quaere* whether reliance on the advice of an expert can amount to a reasonable excuse; see *Saddleworth Urban District Council* v. *Aggregate and Sand, Ltd.* (1970), 69 L.G.R. 103.

Once evidence of a reasonable excuse emerges, it is for the prosecution to eliminate the existence of that defence to the satisfaction of the court; see *R.* v. *Clarke*, [1969] 2 All E.R. 1008, C.A.

Knowingly. Knowledge is an essential ingredient of the offence and must be proved by the prosecution; see, in particular, *Gaumont British Distributors, Ltd.* v. *Henry*, [1939] 2 K.B. 711; [1939] 2 All E.R. 808.

Knowledge includes the state of mind of a person who shuts his eyes to the obvious; see *James & Sons, Ltd.* v. *Smee*, [1955] 1 Q.B. 78, at p. 91; [1954] 3 All E.R. 273 at p. 278, *per* Parker, J. Moreover, there is authority for saying that where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes in law actual knowledge of the facts in question; see *Knox* v. *Boyd*, 1941 J.C. 82, at p. 86, and *Taylor's Central Garages (Exeter), Ltd.* v. *Roper* (1951), 115 J.P. 445, at pp. 449, 450, *per* Devlin, J.; and see also, in particular, *Mallon* v. *Allon*, [1964] 1 Q.B. 385; [1963] 3 All E.R. 843, at p. 394 and p. 847, respectively. Yet mere neglect to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge; *Taylor's Central Garages (Exeter), Ltd.* v. *Roper*, *ubi supra*, *per* Devlin, J.; and cf. *London Computator, Ltd.* v. *Seymour*, [1944] 2 All E.R. 11; but see also *Mallon* v. *Allon*, *ubi supra*.

As to when the knowledge of an employee or agent may be imputed to his employer or principal, see 11 Halsbury's Laws (4th Edn.), para. 54.

Conviction on indictment. All proceedings on indictment are to be brought before the Crown Court; see the Courts Act 1971, s. 6 (1), Vol. 41, p. 294.

Fine. There is no specific limit to the amount of the fine which may be imposed on conviction on indictment, but the fine should be within the offender's capacity to pay; see, in particular, *R.* v. *Churchill (No. 2)*, [1967] 1 Q.B. 190; [1966] 2 All E.R. 215, C.C.A. (reversed on other grounds *sub nom. Churchill* v. *Walton*, [1967] 2 A.C. 224; [1967] 1 All E.R. 497, H.L.); and see also the Bill of Rights (1688), s. 1, Vol. 6, p. 490.

Summary conviction. Summary jurisdiction and procedure are mainly governed by the Magistrates' Courts Act 1980, title Magistrates', *post*, and by rules under s. 144 of that Act.

Sub-s. (2): Citizen of the United Kingdom and Colonies. As to citizenship of the United Kingdom and Colonies, see the British Nationality Act 1948, Part II, Vol. 4, pp. 866 *et seq.*, in conjunction with, in particular, the Commonwealth Immigrants Act 1962, s. 12 (2), Vol. 4, p. 40, and the Immigration Act 1971, s. 2 (5), Sch. 1, Vol. 41, pp. 18, 56.

Body corporate. For the general law relating to corporations, see 9 Halsbury's Laws (4th Edn.), paras. 1201 *et seq.*

United Kingdom. See the note to s. 1, *ante*.

Sub-s. (3): England; Wales. For meanings, see the Interpretation Act 1978, s. 5, Sch. 1, Vol. 48, pp. 1299, 1317, 1323.

Secretary of State. See the note to s. 1, *ante*.

Consent of the Attorney General. Consent should be proved before the summons is issued, and the point that consent is lacking cannot be taken for the first time after the case for the prosecution has been closed; see *Price* v. *Humphries*, [1958] 2 Q.B. 353; [1958] 2 All E.R. 725.

In certain cases the functions of the Attorney General may be discharged by the Solicitor General; see the Law Officers Act 1944, s. 1, Vol. 6, p. 728. As to arrest, remand, etc., where the consent of the Attorney General has not yet been given, see the Prosecution of Offences Act 1979, s. 6, Vol. 49, p. 285, and as evidence of such consent; see s. 7 of that Act, *ibid.*

Attorney General for Northern Ireland. By the Northern Ireland Constitution Act 1973, s. 10 (1), Vol. 43, p. 1180, the Attorney General for England and Wales is *ex officio* Attorney General for Northern Ireland also; and by s. 10 (2), (3) of that Act, *ibid.*, the functions of the Attorney General for Northern Ireland may be discharged by the Solicitor General for England and Wales in certain cases.

Sub-s. (5): Passing of this Act. This Act was passed, *i.e.*, received the Royal Assent, on 20th March 1980.

Magistrates' Courts Act 1980, s. 32. See title Magistrates, *post*.

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4. Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975

A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

NOTES

United Kingdom; Secretary of State. See the notes to s. 1, *ante*.

Court or tribunal of an overseas country. For the meaning of "overseas country", see s. 8 (2), *post*; and for the meaning of this expression as it relates to a federal state, see s. 8 (3), *post*.

Conclusive evidence. The tendering of evidence declared by statute to be conclusive precludes evidence to the contrary unless the evidence adduced is inaccurate on the face of it or fraud is shown, but other evidence to the same effect is not made inadmissible; see 17 Halsbury's Laws (4th Edn.), para. 28.

Evidence (Proceedings in Other Jurisdictions) Act 1975, s. 2. See Vol. 45, p. 484.

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5. Restriction on enforcement of certain overseas judgments

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

(*a*) a judgment for multiple damages within the meaning of subsection (3) below;

(*b*) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(*c*) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (*a*) or (*b*) above.

(3) In subsection (2) (*a*) above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2) (*b*) above make an order in respect of any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2) (*a*) above applies to a judgment given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection (1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

NOTES

Sub-s. (1): United Kingdom. See the note to s. 1, *ante*.

Sub-s. (2): Judgment for multiple damage. For the recovery of awards of multiple damages where a court of an overseas country has given a judgment for multiple damages, see s. 6, *post*.

Sub-s. (3): Person. See the note "Persons" to s. 1, *ante*.

Sub-s. (4): Secretary of State; appears. See the notes to s. 1, *ante*.

Carrying on of business. See note "Carrying on business" to s. 1, *ante*.

Sub-s. (5): Statutory instrument; subject to annulment. See the note to s. 1, *ante*.

Sub-s. (6): Passing of this Act. See the note to s. 3, *ante*.

Definitions. For "overseas country", see s. 8 (2), *post*; as to "court of an overseas country", see s. 8 (3), *post*; as to "claim for contribution", see s. [illegible] (4), *post*. Note as to "judgment for multiple damages", sub-s. (3) above.

Administration of Justice Act 1920, Part II. See Vol. 6, pp. 353 *et seq.*

Foreign Judgment (Reciprocal Enforcement) Act 1933, Part I. See Vol. 6, pp. 365 *et seq.*

Orders under this section. At the time of going to press no order had been made under sub-s. (4) above.

Rules of court. Consequent upon this section R.S.C. Ord. 71, r. 3 (1), has been amended by S.I. 1980 No. 629, so as to require the affidavit supporting an application for registration of a judgment under the Administration of Justice Act 1920, Part II, Vol. 6, pp. 353 *et seq.*, or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Part I, Vol. 6, pp. 365 *et seq.*, to verify that the judgment is not a judgment to which this section applies.

6. Recovery of awards of multiple damages

(1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5 (3) above against—

(*a*) a citizen of the United Kingdom and Colonies; or

(*b*) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or

(*c*) a person carrying on business in the United Kingdom,

(in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

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(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or to a party entitled to contribution include references to any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

(7) This section shall, with the necessary modifications, apply also in relation to any order which is made by a tribunal or authority of an overseas country and would, if that tribunal or authority were a court, be a judgment for multiple damages within the meaning of section 5 (3) above.

(8) This section does not apply to any judgment given or order made before the passing of this Act.

NOTES

Sub-s. (1): Citizen of the United Kingdom and Colonies; body corporate. See the notes to s. 3, *ante*.

United Kingdom; carrying on business. See the notes to s. 1, *ante*.

Person. See the note "Persons" to s. 1, *ante*.

Sub-s. (3): Individual. This word is used instead of the word "person" in order, presumably, to exclude bodies of persons corporate or unincorporate; cf. the Interpretation Act 1978, s. 5, Sch. 1, Vol. 48, pp. 1299, 1320, and *Whitney* v. *Inland Revenue Comrs.*, [1926] A.C. 37, at p. 43, *per* Viscount Cave, L.C.

Ordinarily resident. "Ordinarily" means here according to the way in which one's life is usually ordered; see *Levene* v. *Inland Revenue Comrs.*, [1928] A.C. 217, at p. 232, [1928] All E.R. Rep. 746, H.L., at p. 754, *per* Lord Warington of Clyffe. "I think the converse of 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'"; see *Inland Revenue Comrs.* v. *Lysaght*, [1928] A.C. 234, at p. 243; [1928] All E.R. Rep. 575, at p. 580, *per* Viscount Sumner. A temporary sojourn may become ordinary residence owing to circumstances beyond the control of the person concerned; see *Re Mackenzie*, [1941] Ch. 69; [1940] 4 All E.R. 310; and cf. *Re Bright, Ex parte Bright* (1903), 51 W.R. 342, C.A.; *R.* v. *Denman, Ex parte Staal* (1917), 86 L.J.K.B. 1328; and *Pillar* v. *Richardson* (1918), 87 L.J.K.B. 59. However, ordinary residence can be changed in a day; see, in particular, *Macrae* v. *Macrae*, [1949] P. 397; [1949] 2 All E.R. 34, C.A. See also *Hopkins* v. *Hopkins*, [1951] P. 116; [1950] 2 All E.R. 1035; *Lowry* v. *Lowry*, [1952] P. 252; [1952] 2 All E.R. 61; *Stransky* v. *Stransky*, [1954] P. 428; [1954] 2 All E.R. 356; *Lewis* v. *Lewis*, [1956] 1 All E.R. 375; *R.* v. *Edgehill*, [1963] 1 Q.B. 593; [1963] 1 All E.R. 181, C.C.A.; and *Re Brauch (a debtor), Ex parte Britannic Securities & Investments, Ltd.*, [1978] 1 All E.R. 1004, C.A.

A person resides where in common parlance he lives, and a temporary absence is immaterial providing there is an intention to return and a house or lodging to which to return; see *R.* v. *St. Leonard's Shoreditch (Inhabitants)* (1865), L.R. 1 Q.B. 21, and *R.* v. *Glossop Union* (1866), L.R. 1 Q.B. 227. The word "reside" implies a degree of permanence (*Levene* v. *Inland Revenue Comrs.*, [1928] A.C. 217, at pp. 222, 223; [1928] All E.R. Rep. 746, H.L., at pp. 749, 750; *Fox* v. *Stirk* [1970] 2 Q.B. 463, at p. 477; [1970] 3 All E.R. 7, C.A., at p. 13; *Brokelmann* v. *Barr*, [1971] 2 Q.B. 602; [1971] 3 All E.R. 29), but a person may be resident in more than one place at the same time (*Levene* v. *Inland Revenue Comrs*, *ubi supra*, *Langford Property Co., Ltd.* v. *Tureman*, [1949] 1 K.B. 29; *sub nom. Langford Property Co., Ltd.* v. *Athanassoglou*, [1948] 2 All E.R. 722, C.A.); *Herbert* v. *Bryne*, [1964] 1 All E.R. 882, C.A.; and contrast *Beck* v. *Scholz*, [1953] 1 Q.B. 570; [1953] 1 All E.R. 814, C.A.).

Principal place of business. As to what is a "place of business", see *Lord Advocate* v. *Huron and Erie Loan and Savings Co.*, 1911 S.C. 612. The question as to what is a principal place of business is one of fact; see *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; *Re Hilton, Gibbes* v. *Hale-Hinton*, [1909] 2 Ch. 548; and *Egyptian Delta Land and Investment Co., Ltd.* v. *Todd*, [1929] A.C. 1. Cf. also the decisions on the meaning of the expression "principal office" in *Garton* v. *Great Western Rail Co.* (1858), E.B. & E. 837, *Palmer* v. *Caledonian Rail Co.*, [1892] 1 Q.B. 923, and *Clokey* v. *London and North Western Rail. Co.*, [1905] 2 I.R. 251.

Sub-s. (4): Carried on business. See the note "Carrying on business" to s. 1, *ante*.

Sub-s. (5): Court . . . may entertain proceedings, etc. Consequent upon sub-s. (5) R.S.C. Ord. 11, r. 1 (1), has been amended by S.I. 1980 No. 629, so as to allow service of a writ, or notice of a writ, out of the jurisdiction with the leave of the court if the action begun by the writ is brought under this Act.

Sub-s. (8): Passing of this Act. See the note to s. 3, *ante*.

Enforcement of overseas judgments. As to the enforcement in the United Kingdom of overseas judgments given under provisions corresponding to this section, see s. 7, *post*.

Definitions. For "overseas country", see s. 8 (2), *post*; as to "court of an overseas country", see s. 8 (3), *post*; as to "entitled to contribution", see s. 8 (4), *post*. Note as to "qualifying defendant", sub-s. (1) above, and as to "an amount paid by the qualifying defendant", sub-s. (6) above.

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7. Enforcement of overseas judgment under provision corresponding to s. 6

(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.

(2) An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

NOTES

Definitions. For "overseas country", see s. 8 (2), *post*; as to "law of an overseas country", see s. 8 (3), *post*.

Foreign Judgments (Reciprocal Enforcement) Act 1933. See Vol. 6, p. 365.

Orders in Council under this section. At the time of going to press no Order in Council had been made under this section.

The power to make Orders in Council is exercisable by statutory instrument; see the Statutory Instruments Act 1946, s. 1 (1), Vol. 32, p. 668.

8. Short title, interpretation, repeals and extent

(1) This Act may be cited as the Protection of Trading Interests Act 1980.

(2) In this Act "overseas country" means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom are responsible.

(3) References in this Act to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, references to the law or a court, tribunal or authority of any constituent part of that country.

(4) References in this Act to a claim for, or to entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law.

(5) The Shipping Contracts and Commercial Documents Act 1964 (which is superseded by this Act) is hereby repealed, *together with paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act 1977 (which contain amendments of that Act)*.

(6) Subsection (5) above shall not affect the operation of the said Act of 1964 in relation to any directions given under that Act before the passing of this Act.

(7) This Act extends to Northern Ireland.

(8) Her Majesty may by Order in Council direct that this Act shall extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom are responsible.

NOTES

The words printed in italics in sub-s. (5) above were repealed by the Magistrates' Courts Act 1980, s. 154 (3), Sch. 9.

United Kingdom. See the note to s. 1, *ante*.

Passing of this Act. See the note to s. 3, *ante*.

Shipping Contracts and Commercial Documents Act 1964. See Vol. 31, p. 675.

Criminal Law Act 1977, Sch. 2, Para. 18, Sch. 3, para. 24. See Vol. 47, pp. 736, 739.

Orders in Council under this section. At the time of going to press no Order in Council had been made under sub-s. (8) above.

The power to make Orders in Council is exercisable by statutory instrument; see the Statutory Instruments Act 1946, s. 1 (1), Vol. 32, p. 668.